

(23,904)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 279.

LUMBER UNDERWRITERS OF NEW YORK ET AL.,
PETITIONERS,

vs.

O. C. RIFE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original. Print	
Caption	a	1
Transcript from the circuit court of the United States for the western district of Tennessee.....	1	1
Caption	1	1
Transcript from State court.....	1	1
Bill of complaint.....	1	1
Cost bond	5	5
Subpoena	5	5
Petition for removal.....	6	6
Bond for removal.....	7	7
Order of removal.....	8	8
Order to file and docket cause.....	9	8
Special appearance to question jurisdiction of the court over the person of the defendant.....	9	9
Motion for alias writ.....	12	11
Affidavit of Caruthers Ewing.....	12	12
Order to issue alias summons.....	15	14

	Original. Print	
Alias summons	15	14
Bill of exceptions to action of court in sustaining plaintiffs' motion for an alias summons.....	17	16
Motion on behalf of the defendant to dispose of special appearance	18	17
Opinion by McCall, J., on motion to quash service of process on D. A. Fisher, etc.....	18	17
Decree sustaining motion to quash, etc.....	20	19
Declaration	20	19
Motion to quash alias summons.....	24	23
Order denying motion to quash alias summons.....	26	24
Motion praying over.....	26	25
Order granting additional time within which to file pleas..	27	26
Plea in abatement	28	26
Motion to strike out plea in abatement.....	29	27
Opinion by McCall, J., on motion to strike out plea in abatement	29	27
Order striking out plea in abatement.....	31	30
Amended alias summons.....	31	30
Petition for a rehearing on motion to strike plea in abatement from the files.....	33	31
Order denying petition for rehearing.....	35	33
Demurrer	35	34
Motion to require plaintiff to reform the declaration.....	36	34
Order overruling demurrer.....	36	35
Reformed declaration	37	35
Pleas of Eugene F. Perry, attorney-in-fact for Lumber Underwriters	44	42
Pleas of Lumber Underwriters.....	47	45
Motions to strike out pleas.....	49	47
Order striking out pleas.....	52	50
Notice to produce certain original papers.....	53	51
Order granting nonsuit as to \$2,000 policy.....	54	52
Verdict and judgment for defendant.....	55	53
Motion for a new trial.....	56	53
Order overruling motion for a new trial.....	59	56
Order allowing bill of exceptions.....	59	57
Bill of exceptions.....	59	57
Evidence for plaintiff.....	59	57
Testimony of R. K. Howard.....	60	58
Testimony of O. C. Rife.....	63	60
Exhibit—Plat	66½	62
Exhibit (1)—Letter from Wm. A. Stone to Rife and Stutzman, November 1, 1909.....	70	67
Exhibit "E. M. L."—Plat.....	74½	70
Testimony of F. A. Stutzman.....	75	71
Testimony of James R. Blair.....	85	79
Plaintiff rests	88	82
Motion to direct verdict for defendant.....	88	82
Motion overruled	89	82
Evidence for defendant.....	89	83

INDEX.

iii

	Original	Print
Testimony of E. M. Lindsey.....	89	83
Exhibit "A"—Plat	92½	85
Judge's certificate to bill of exceptions.....	93	86
Reply to prayer for oyer insurance policies Nos. 27979 and 27868	94	86
Petition for writ of error.....	95	87
Assignment of errors.....	96	88
Order allowing writ of error.....	99	91
Bond on writ of error.....	99	91
Writ of error.....	100	92
Citation and service.....	101	93
Order extending time for filing transcript.....	102	94
Order extending time for printing record.....	103	95
Clerk's certificate	103	95
Judge's certificate to clerk.....	104	96
Præcipe for appearance.....	105	96
Order of argument and submission.....	106	97
Judgment	106	97
Opinion, Knappen, J.....	108	98
Petition for rehearing.....	116	103
Brief in support of petition for rehearing.....	120	105
Order denying petition for rehearing.....	136	113
Clerk's certificate	137	113
Writ of certiorari and return.....	138	113



United States Circuit Court of Appeals, Sixth Circuit.

No. 2232.

O. C. RIFE and F. A. STUTZMAN, Plaintiffs in Error,
vs.
THE LUMBER UNDERWRITERS, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Record.

Original Transcript filed September 27, 1911.
Filed Dec. 1, 1911. Frank O. Loveland, Clerk.

1 TRANSCRIPT OF RECORD.

Filed May 21, 1910. Dan F. Elliotte, Clerk.

Circuit Court of the United States, Western District of Tennessee,
Chancery Court of Shelby County.

STATE of TENNESSEE,
Shelby County:

Be it Remembered, That at a Term of the Chancery Court of Shelby County, State aforesaid begun and held at the Court House in the City of Memphis, in and for said County on Monday the 4th day of October, 1909, the same being the first Monday in October, 1909, present and presiding the Hon. H. D. Minor, Chancellor of said Court, the following proceedings were had:

In the Chancery Court of Shelby County, Tennessee.

No. 15820, R. D.

O. C. RIFE and F. A. STUTZMAN, Doing Business as Rife & Stutzman, Complainants,
vs.

LUMBER UNDERWRITERS OF NEW YORK, an Insurance Corporation or Association, Doing Business in Tennessee, and of which D. A. Fisher, a Citizen of Shelby County, Tennessee, is the Agent and Who Was the Agent Acting for it in the Matter Set Forth in the Bill, Defendants.

To the Honorable the Chancery Court of Shelby County, Tennessee:

Complainants respectfully show unto the Court that they are partners in trade under the firm name of Rife & Stutzman, the

complainant Rife being a citizen of Shelby County, Tennessee, and the complainant Stutzman residing at Tribbett, Miss., that complainants are engaged in the saw mill business and prior to Sept. 17th, 1909, owned and operated a saw mill at Tribbett, Washington County, Mississippi, and has been there engaged in said business for a number of years. On said date the complainants' mill, lumber, stacking sticks, covering boards, foundations, sheds, etc., were destroyed by a fire of accidental origin inflicting upon complainants a loss of about \$27,000.00.

Complainants had only \$7,000.00 in insurance represented by policies as follows:

Policy No. 27979, for \$2,000.00, issued by "Lumber Underwriters" on Sept. 16, 1909.

Policy No. 27868, for \$5,000.00, issued by "Lumber Underwriters" on May 22nd, 1909.

2 Both of said policies were in force at the time of the fire aforesaid and same are herewith filed as a part of this bill and exhibited herewith.

Both of said policies were issued and D. A. Fisher of Memphis, Tennessee, the duly authorized agent of said "Lumber Underwriters."

As shown by the endorsements on said policies, each is a renewal of a previous policy which had expired. In other words, the said "Lumber Underwriters" had before the issuance of either of said policies had policies on the same property, being the property destroyed by fire, as aforesaid.

When the first insurance was obtained from D. A. Fisher agent aforesaid, he inquired as to how far complainants' mill was from the fixed lumber stacks and he was informed that it was exceeding 100 feet.

When the first policies were issued complainants presume, and so charge, that the clear space clause provided for 100 feet between the Lumber and the mill, being the only "wood-working or manufacturing establishment" in that vicinity.

During the existence of the earlier policies the said "Lumber Underwriters" sent an agent to the complainants' mill and he examined into and became fully acquainted with the exact conditions, which conditions continued up to the fire. The said "Lumber Underwriters" had a plat which showed the exact conditions at the mill of complainants.

In Policy No. 27868, \$5,000.00, issued May 22nd, 1909, appears the following:

"Warranted by the assured that a continuous clear space of 100 feet shall at all times be manifested between the property hereby insured and any wood-working or manufacturing establishment dry kiln or forest, and that said space shall not be used for the handling or piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled, alone being excepted, but this shall not be construed to prohibit loading and unloading within, or the transportation of lumber and timber products across such clear space, it being especially agreed and understood by the assured that

any violation of this warranty shall render this policy null and void."

Attention is called to the fact that the "Clear space clause" therein was 100 feet.

This was in accordance with the statement made to the agent when preceding policy or policies was — procured. It will be noted that the rate is \$25.00 per \$1,000.00 with a "clear space" of 100 feet.

3 In policy No. 27979, \$2,000.00, issued Sept. 16th, 1909, appears the following:

"Warranted by the assured that a continuous clear space of 150 feet shall hereafter be maintained between the property hereby insured, and any wood-working or manufacturing establishment and that said space shall not be used for the handling or piling of lumber thereon for temporary purposes; tramways upon which lumber is not piled, railroad cars, loaded or unloaded and fences alone being excepted; but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and forest products across such clear space; it being especially understood and agreed by the assured that any violation of this warranty shall render this policy null and void."

It will be noted that while rate is exactly the same as where the "clear space" is 100 feet, the "Clear space" clause provides for 150 feet.

The "Lumber Underwriters" knew at the time the exact condition and knew that while complainants had a clearance of 100 feet they did not have a clearance of 150 feet, and while the rate was not decreased, because there was no material increase in the hazard, the "clear space clause" was fraudulently changed, without complainants' knowledge or authority and in the teeth of what was known to be the conditions, from 100 to 150 feet.

This policy wherein the fraudulent change was made was never in the possession of complainants but policy No. 27657 expiring on the date policy No. 27979 was issued, was held by Bennett & Witte and was sent to them to carry on the insurance so expiring

Complainants never at any time examined said policies here sued on nor the previous ones and knew nothing of said "clear space clause," and while conceding that they are bound by the ordinary terms of the policies, they deny that they are bound by any policy stipulation which is in direct conflict with the facts stated to the insurance agent when the insurance was taken out and they charge that upon their statement of a specific fact to such agent, they were entitled to rest on the belief that he would not accept the premises and issue complainants a policy in conflict with what he was told and with what he and the company or association knew to be the facts, so as to get the premiums and yet furnish a policy that constituted no protection to complainants.

Having issued the policy with notice and knowledge of all the facts, with notice from policy 27868 that the clearance complainants expected to maintain was 100 feet, with a direct statement to that effect, with a plat in their possession showing the facts and after a physical examination by an agent sent

for that purpose, the insurer cannot rely upon said provision, so fraudulently inserted.

The actual clearance was 143 feet.

After the fire, as aforesaid, the insurer was duly notified and proceeded to investigate and as complainants thought to adjust the loss. Finally W. A. Stone, the adjuster and agent of the defendant insurer, wrote complainants a letter as follows:

"MEMPHIS, TENN., Nov. 1st, 1909.

Messrs. Rife and Stutzman, Tribbett, Miss.

GENTLEMEN: Referring to your alleged claim for loss upon lumber destroyed by fire on the 17th of September, 1909, against the Lumber Underwriters, whose policies Nos. 27868 and 27979 you hold, I beg to call your attention to the clear space clause attached to same, and made part of the contract. These clauses you have violated, and under the circumstances, the Company feels it has no liability, and respectfully declined to consider any claim against it.

Very truly yours,

WM. A. STONE, *Adjuster.*"

This letter was sent to Tribbett, Miss., and was returned to complainant Rife, at Memphis,—he having the matter in charge—and was received by him Nov. 16th, 1909.

The original of said letter will be produced on or before the hearing.

Complainants charge that the insurer having assigned the "clear space clause" as aforesaid, as the sole reason why it denies liability and why it "declines" to consider any claim against it the only open question is whether said clause, under all the circumstances, invalidates the policies.

As to policy No. 27868, the complainants charge that there was no violation of said provision and that the insurer so knew the fact.

As to policy No. 27979, the complainants charge that the insurer, on the facts hereinabove set out, is stopped to rely thereon, it has waived the same, the same was fraudulently inserted in the policy and the fact fraudulently concealed from complainants.

Complainants charge that the refusal by the insurer to pay said loss is arbitrary and capricious and wrongful; it is not in good faith nor in an honest belief that same should not be paid.

5 Complainants charge that such refusal, so made in bad faith, entails cost and expense on complainants in the collection of said insurance and damages them to the extent of 25 per cent of the face of the policies.

Premises Considered, Complainants pray that the "Lumber Underwriters" be made a party defendant hereto by service of process on D. A. Fisher, its agent, and that it be required to answer this bill but not on oath.

Grant complainants a decree against said defendant for \$7,000.00 with interest from date and also for 25 per cent thereof, as damages, under the statutes of Tennessee.

Grant complainants such other and further relief as they may be entitled to in the premises.

C. L. MARSILLANTT,
CARUTHERS EWING,
Solicitors for Complainants.

STATE OF TENNESSEE,
County of Shelby:

O. C. Rife makes oath that the statements made in the foregoing bill are true to the best of his knowledge, information and belief.

O. C. RIFE.

Sworn to and subscribed before me, this November 17th, 1909.

[SEAL.]

J. E. DILLARD,
Notary Public.

Cost Bond.

We, O. C. Rife and F. A. Stutzman as principals and ——— as surety acknowledge ourselves indebted to Lumber Underwriters of New York, a corporation in the sum of two hundred and fifty dollars to be void if the said O. C. Rife and F. A. Stutzman complainants, in a bill which has this day been filed in the Chancery Court of Shelby County, against the said Lumber Underwriters of New York shall pay all such costs as may be awarded against them by the Court in its decrees and orders in said cause.

This 17th day of November, A. D. 1909.

RIFE & STUTZMAN,
By O. C. RIFE,
W. S. A. CASTLES.

Subpoena to Answer.

Issued Nov. 17, 1909.

The State of Tennessee to the Sheriff of Shelby County:

Summon Lumber Underwriters of New York, D. A. Fisher, agent, if to be found in your County to appear before the Chancery Court of Shelby County, at the Court House in Memphis, Tenn., on the First Monday in Dec. next then and there to answer the bill of complainant of O. C. Rife, et al., a copy of which accompanies this writ. Herein fail not and have you then and there this writ.

Witness Lamar Heiskell, Clerk and Master of said court, at office in Memphis, this 17th day of Nov. 1909.

LAMAR HEISKELL,
Clerk & Master,
By W. M. COX, D. C. & M.

Sheriff's Returns.

Came to hand Nov. 17, 1909, executed Nov. 20, 1909, on Lumber Underwriters of New York by reading to D. A. Fisher its agt. and left with him the copy of bill.

F. L. MONTEVERDE, *Sheriff*,
By G. W. BLACKWELL, D. S.

Petition and Bond for Removal to U. S. Court.

Filed Dec. 6, 1909.

In the Chancery Court of Shelby County, Tennessee.

No. 15820, R. D.

O. C. RIFE and F. A. STUTZMAN, Doing Business as Rife & Stutzman,
vs.

LUMBER UNDERWRITERS OF NEW YORK.

To the Honorable Chancellors of said Court:

Your petitioner, the Lumber Underwriters respectfully shows unto this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and cost, the sum or value of two thousand dollars;

That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled cause, was at the time of the commencement of the suit, and still is, a resident and citizen of the State of New York, City of New York, and a non-resident of the State of Tennessee; and that the plaintiffs are doing business under the name of Rife and Stutzman in the State of Mississippi. One of said plaintiffs, to-wit, O. C. Rife, was at the commencement of the suit, and still is, a resident and citizen of the State of Tennessee, and the other plaintiff, to-wit, F. A. Stutzman, was, and still is, a resident and citizen of the State of Mississippi;

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said

7 Court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of the United States in and for the Western Division of the Western District of Tennessee.

LUMBER UNDERWRITERS OF
N. Y.,

By TREZEVANT, BARTELS AND
TREZEVANT, *Att'ys.*

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

STATE OF TENNESSEE,
County of Shelby:

Personally appeared before me, Millard Naill, R. L. Bartels, who made oath in due form of law that he was the agent and attorney of the Lumber Underwriters, the petitioner, and that the facts stated in said petition are known to him, as such attorney, to be true and correct.

R. L. BARTELS.

Sworn to and subscribed before me, this the 6th day of December, 1909.

[SEAL.]

MILLIARD NAILL,
Notary Public.

Known All Men By These Presents, That the Lumber Underwriters, of New York City, N. Y., as principal and D. A. Fisher as surety, are held and firmly bound unto O. C. Rife and F. A. Stutzman, doing business under the firm name of Rife & Stutzman, in the penal sum of two hundred and fifty dollars (\$250.00) for the payment of which well and truly to be made, we bind ourselves, our heirs and representatives.

But the condition of the above obligation is such that whereas, the said Lumber Underwriters has petitioned the Chancery Court of Shelby County, Tennessee, for the removal of a certain cause therein pending, wherein the said O. C. Rife, et al., are plaintiffs, and the said Lumber Underwriters is defendant, to the Circuit Court of the United States in and for the Western Division of the Western District of Tennessee;

Now, therefore, if the said Lumber Underwriters shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit — of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be
8 void; otherwise, to remain in full force and effect.

In Witness Whereof, the parties hereto have set their hands, this the 6th day of December, 1909.

LUMBER UNDERWRITERS
OF N. Y.,
By TREZEVANT, BARTELS &
TREZEVANT, *Att'ys.*
D. A. FISHER.

Order Allowing Removal to U. S. Circuit Court.

Entered Jan. 31, 1910.

No. 15820, D. D.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

In this cause, petition and bond for removal to the United States Circuit Court having been filed within the time required by law, and being in accordance with the Acts of Congress, relative to removals of causes from the State Court to the United States Court, and the Court being of the opinion that the cause is one in which the defendant is entitled to a removal, said removal is hereby allowed.

The Clerk will make up a transcript of the record for filing in the Circuit Court of the United States at Memphis.

At the hearing of the petition to remove this cause to the Federal Court the complainants, by their solicitors of record, appeared in open Court and opposed the said petition which was granted without the consent of the complainants to this suit and attention of Court and counsel for the defendants was called to Ch. 253 of the Acts of 1907, and thereafter the defendant proceeded to apply for and obtain the order, as aforesaid, to remove said suit without the consent of the other party to the Federal Court and to the above action complainants except.

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof Begun and Held for its November Term, A. D. 1910, at the United States Court House, in the City of Memphis, in said District, on, to wit, the 21st Day of May, A. D. 1910, in the Following Cause, to wit:

O. C. RIFE et al., Plaintiff,

VS.

LUMBER UNDERWRITERS OF NEW YORK, Defendant.

Order to File and Docket Cause.

This day came the respondent by its solicitors and presents to the Court a transcript of the record on removal thereof, to this Court

from the Chancery Court of Shelby County, Tennessee, and moves the Court for leave to file and docket the same,

Upon Consideration Whereof, It is hereby Ordered that said motion be and it is hereby granted and said transcript ordered filed and entered upon the docket of this Court accordingly.

Enter:

McCALL, Judge.

In the Circuit Court of the United States, Western Division of the Western District of Tennessee.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS OF NEW YORK.

Special Appearance to Question Jurisdiction of the Court Over the Person of the Defendant.

Filed May 25, 1910. Dan F. Elliotte, Clerk.

Now comes the defendant in the above styled cause, and appearing only for the purpose of questioning the jurisdiction of the Court over the person of the defendant, and not generally, or for any other purpose, says:

The Defendant is sued as "Lumber Underwriters of New York, an insurance corporation or association doing business in Tennessee." The object of the suit is to recover upon two fire insurance policies alleged to have been issued by the "Lumber Underwriters," both of which policies constitute a part of the bill and are filed and exhibited thereto.

Process issued to the Sheriff of Shelby County, (the suit having originally been instituted in the Chancery Court of that County and subsequently removed to this Court), requiring him to, "Summon Lumber Underwriters of New York, D. A. Fisher, Agent, if to be found in your County, etc., * * * to answer the bill of complaint of O. C. Rife, et al., * * *." This process was executed according to the return thereon in the following manner, to-wit:

"Came to hand November 17, 1909, executed November 20, 1909, on Lumber Underwriters of New York, by reading to D. A. Fisher, Agent." F. L. Monteverde, Sheriff, by G. W. Blackwell, Deputy Sheriff.

The Lumber Underwriters of New York is not, and was not at the time of the commencement of this action a corporation nor a joint stock company, but it is now and was at the commencement of this action, a voluntary association composed of fifteen individuals, to-wit:

Fred R. Babcock, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Pennsylvania, and a non-resident of the State of Tennessee;

Charles H. Carleton, who is now, and was at the commencement

of this action, a resident and citizen of the State of Ohio, and a non-resident of the State of Tennessee;

Frederick W. Cole, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of New York, and a non-resident of the State of Tennessee;

George F. Craig, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Pennsylvania, and a non-resident of the State of Tennessee;

Lewis Dill, who is now, and was at the time of the commencement of this suit, a resident of the State of Tennessee;

Robert W. Higbie, who is now, and was at the time of the commencement of this suit, a resident and citizen of the State of New York, and a non-resident of the State of Tennessee;

William Arthur Holt, who is now, and was at the time of the commencement of this action, a resident and citizen of the State of Wisconsin, and a non-resident of the State of Tennessee;

Walter C. Laidlow, who is now, and was at the time of the commencement of this suit, a citizen of Great Britain and a resident of the Province of Ontario, Dominion of Canada, and a non-resident of the State of Tennessee;

H. Shumway Lee, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of New York, and a non-resident of the State of Tennessee;

Robert C. Lippincott, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Pennsylvania, and a non-resident of the State of Tennessee;

George B. Montgomery, who is now, and was at the time of the commencement of this suit, a citizen and resident of the
11 State of New York, and a non-resident of the State of Tennessee;

Eugene F. Perry, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of New York, and a non-resident of the State of Tennessee;

Charles H. Prescott, Junior, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Ohio, and a non-resident of the State of Tennessee;

Frank C. Rise, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Massachusetts, and a non-resident of the State of Tennessee.

D. A. Fisher, of Memphis, Tenn., upon whom process was served in this suit, was not authorized to accept or acknowledge service of process on behalf of the Lumber Underwriters, or any of the individuals composing the association.

Wherefore, defendant says that this Court has no jurisdiction over its person or the person of the individual underwriters composing the defendant association, by reason of the process served on D. A. Fisher herein.

LUMBER UNDERWRITERS.
EUGENE F. PERRY,
Attorney-in-Fact.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

STATE OF N. Y.,
County of N. Y.:

Personally appeared before me, H. F. Stitt, a Notary Public in and for said County and State, Eugene F. Perry, who made oath in due form of law that he was the Attorney-in-fact for the Lumber Underwriters of New York, and that the facts set out in the above plea were true in substance and in fact.

EUGENE F. PERRY.

Sworn to and subscribed before me this 23rd day of May, 1910.

H. F. STITT,

Notary Public, Rockland Co.

Certificate filed in N. Y. Co.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS OF NEW YORK.

12 *Motion for Alias Writ.*

Filed June 14, 1910. Dan F. Elliotte, Clerk.

Now come the plaintiffs and move the Court for the issuance of an alias summons in this cause to the end that the validity of the service of process on D. A. Fisher, as agent of defendant, may be eliminated from this law suit. Plaintiffs file herewith the affidavit of Caruthers Ewing, one of their attorneys herein, as the basis of this motion and plaintiffs move the Court to make all proper orders and enter all proper judgment herein as will be necessary to give this Court jurisdiction of the defendant.

This the 14th day of June, 1910.

C. R. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiff.

Service of this motion accepted and hearing set for June 18, 1910.

TREZEVANT, BARTELS & TREZEVANT,
Attorneys for Defendants.

In the Circuit Court of the United States for the Western Division
of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed June 14, 1910. Dan F. Elliotte, Clerk.

Affidavit of Caruthers Ewing.

Caruthers Ewing, being duly sworn, makes oath and says that he is one of the attorneys for the plaintiffs in this cause; that Reau E. Folk, Insurance Commissioner of the State of Tennessee, informed affiant and affiant believes the fact to be that upon the coming into the State of the Lumber Underwriters of New York authority was procured from him to commission D. A. Fisher, on whom process was served in this case, to act as agent of said Lumber Underwriters. Affiant states that process was served in this case on D. A. Fisher, as agent of the defendant association, and that the Lumber Underwriters, defendant herein, on May 25th, 1910, filed a plea in abatement and on the oath of Eugene F. Perry, attorney in fact for the Lumber Underwriters, it was said in said plea in abatement:

"D. A. Fisher, of Memphis, Tenn., upon whom process was served in this suit, was not authorized to accept or acknowledge service of process on behalf of the Lumber Underwriters, or any of the individuals composing the association."

13 While affiant is of the opinion that the plea in abatement is insufficient because it states simply the conclusion of Eugene F. Perry that D. A. Fisher was not authorized to accept or acknowledge service of process he does not state that D. A. Fisher was not its agent, nor does the plea of abatement deny that he was its agent, now does it state whether it has or has not an agency in Tennessee, still affiant brings to the attention of the Court the following facts as the basis of a motion this day filed for and by plaintiffs;

On November 24th, 1907, the Lumber Underwriters, the defendants, filed with Reau E. Folk, Insurance Commissioner of the State of Tennessee, its articles of agreement together with a power of attorney whereby Eugene F. Perry was made its agent and attorney in fact in the transaction of its business. On January 20th, 1908, the Lumber Underwriters, the defendants filed with Reau E. Folk, Insurance Commissioner, a power of attorney to accept service, etc., copy of which is herewith attached. By said power of attorney to accept service filed in compliance with the laws of the State of Tennessee, the defendant, the Lumber Underwriters, authorized said

Reau E. Folk, Insurance Commissioner, to be served in order to give the Courts of Tennessee jurisdiction of said Lumber Underwriters.

Affiant states that the said authorization whereby the Insurance Commissioner was to be served with process was an essential prerequisite to the doing of business by defendant in the State of Tennessee and to obviate any question as to the agency of D. A. Fisher, or his authority or the validity of service of process upon him, affiant, on behalf of plaintiffs, petition the Court to direct the Clerk of this Honorable Court to issue an alias summons to the end that same may be served upon said Insurance Commissioner.

CARUTHERS EWING.

Sworn to and subscribed before me, this 14th day of June, 1910.

J. E. DILLARD,

Notary Public.

Tennessee Insurance Department.

Power of Attorney to Acknowledge Service of Process.

Insurance Companies.
(Not Organized in Tennessee.)

Know All Men By These Presents:

That the Lumber Underwriters organized under the laws of the State of New York and thereby authorized to transact the business — Fire Assurance, desiring to transact such business within the State of Tennessee, pursuant to the laws thereof, does, by these presents, authorize the Insurance Commissioner in and for the said State of Tennessee to acknowledge service of all legal process, whether mesne or final, for and in behalf of it, the said corporation above named, in said State of Tennessee, in any judicial proceeding which may, within the said State of Tennessee, be instituted against it, the said Company or to which it may be a party; and the said Lumber Underwriters does hereby, in consideration of the privilege of doing business in said State as aforesaid, consent to and with said State of Tennessee, for the Benefit of all persons concerned, that service of any such process upon such Insurance Commissioner shall be taken and held to be as valid as if served upon it, the said Company above named, according to the laws of said State of Tennessee, or any other State; and the said Lumber Underwriters does hereby further consent that in case it, the said Company above named, shall cease to transact business in the said State of Tennessee, said Insurance Commissioner shall be considered and held as continuing to be Attorney for it, the said Company, for the purposes of process as aforesaid, in any action against it, the said Company above named, upon any policy or liability issued or contracted during the time the said Company transacted business in the said State of Tennessee.

In Witness Whereof, the said Lumber Underwriters, in accordance with the power of attorney gives to Eugene F. Perry — Day of —, A. D. 1907, a certified copy whereof is hereunto attached.

Hereby subscribes to the above at the City of New York, in the State of New York on the 18th day of January, A. D. 1908.

EUGENE F. PERRY,
Attorney in Fact.

Attest:

I, ———, Undersigned Secretary of the — of —, do hereby certify that the following is a true and correct copy from the corporate records of the said Company of a resolution duly adopted by the Board of Directors thereof, at a meeting of said Board, a quorum thereof present and acting on the — day of —, 190—, that is to say:

15 Resolved, That the President and Secretary of this Company are hereby authorized to execute, under the corporate seal of the Company a Power of Attorney, in accordance with the Insurance Laws of the State of Tennessee.

(In writing.)

Copy of Underwriters' agreement already on file with your Department.

E. F. PERRY,
Att'y in Fact.

Given and Certified, at the principal office of said Company, in the City of — State of — and the common seal thereof hereto affixed by the Undersigned, having custody of the same as Secretary of said Company, this — day of —, 190—.

———, *Secretary.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term thereof, Begun and Held for Its May —, 1910, at the United States Court House, in the City of Memphis, in said District, on to-wit: the Eighteenth Day of June, A. D. 1910, in the following Cause, to wit:

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

In this cause came the plaintiffs and moved the Court for the issuance of an alias summons and on the hearing of the motion the plaintiffs offered and read the affidavit of Caruthers Ewing, filed herein on June 14, 1910.

The defendant appeared and objected to the issuance of said alias summons.

On consideration of the motion of plaintiffs, the same is allowed and said alias summons will be accordingly issued by the Clerk. To this action of the Court defendant excepts.

Enter this:

McCALL.

The President of the United States of America to the Marshal of the Middle Western District of Tennessee, Greeting:

You are Hereby Commanded to Summon Lumber Underwriters of New York, an Insurance Association, a resident and citizen of the State of New York, if to be found within your District, to appear before the Judge of the Circuit Court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District, on the fourth Monday in November next, A. D. 1910, and then and there to answer O. C. Rife and F. A. Stutzman, doing business under firm name and style of Rife & Stutzman, citizens of the States of Tennessee and Mississippi respectively, in a plea of Tort, to the damage of said plaintiffs (as they say) Eight thousand, seven hundred and fifty Dollars (\$8,750.00). Herein fail not, and have you then and there this Writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the Seal of said Circuit Court, at said Memphis, this 22nd day of June, A. D. 1910, and the 134th year of American Independence.

[L. s.]

DAN. F. ELLIOTTE, *Clerk*.

Know All Men by these Presents, That we, O. C. Rife and F. A. Stutzman as principal and — as sureties, held and firmly bound unto said defendant Lumber Underwriters of New York, an Association in the sum of Two Hundred and Fifty Dollars; but to be void on condition that the said defendant Lumber Underwriters of New York, an Association, do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the Circuit Court of Shelby County, Tennessee, at said Memphis, against the said defendants; and also on failure of the said plaintiffs to prosecute the said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals, this 17th day of November, A. D. 1910.

	RIFE & STUTZMAN,	[L. s.]
By	O. C. RIFE.	[L. s.]
	W. S. A. CASTLES.	[L. s.]

Marshal's Return.

This Writ came to hand on June 30, 1910, and I duly executed the same, as therein commanded, by making the contents thereof

known to the within named defendant Reau E. Folk, as
 17 State Insurance Agent for the State of Tennessee, on the
 30th day of June, A. D. 1910, and at the same time and
 place delivering to him a duly certified copy thereof, together with
 such copy of the declaration in this suit.

Nashville, Tennessee, June 30th, A. D. 1910.

JOHN W. OVERALL,

U. S. Marshal,

By R. L. SHIRLEY, *Deputy.*

No. 4043. Page 189. U. S. Circuit Court, Western District
 Tennessee, Western Division. O. C. Rife & F. A. Stutzman, doing
 business as Rife & Stutzman vs. Lumber Underwriters of N. Y., an
 Insurance Association. Alias, Summons. Returnable to November
 Term, A. D. 1910. Caruthers Ewing, Attorney. Returned and
 filed at Memphis on the 12 day of July, A. D. 1910. Dan. F. El-
 liotte, Clerk. — — —, D. C. No. 4043.

Circuit Court of the United States, Western District, for the Western
 Division of Tennessee.

No. 4043.

O. C. RIFE and F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

*Bill of Exceptions to Action of Court in Sustaining Plaintiffs' Mo-
 tion for an Alias Summons.*

Filed June 23, 1910. Dan F. Elliotte, Clerk.

Be It Remembered, That on the trial or hearing of the motion
 for an alias summons, made by the plaintiffs, the following pro-
 ceedings were had, to-wit:

Counsel for plaintiffs read or stated to the Court the substance of
 the bill of complaint, together with the process and return of the
 Sheriff thereon, as the same appear in the transcript from the
 Chancery Court of Shelby County, Tennessee, filed herein May 21,
 1910.

He then read to the Court a motion for an alias summons, and the
 affidavit of Caruthers Ewing in support thereof, both of which
 were filed herein on June 14th, 1910.

The defendant, through its counsel, objected to the granting of
 said motion and the issuance of an alias summons, upon the fol-
 lowing grounds, to-wit:

(1) Because the defendant had filed on May 25, 1910, a Special
 Appearance, questioning the jurisdiction of the Court over the per-
 son of the defendant, which Special Appearance had not been dis-
 posed of;

(2) Because the defendant was entitled to have the Special Appearance questioning the jurisdiction of the Court over the person of the Defendant, filed May 25, 1910, disposed of by the Court preliminary to any motion by plaintiffs for additional process;

18 (3) Because the issuance of an alias summons under circumstances shown to exist by the record herein, was unauthorized in law.

The Court overruled the defendant's objection, granted plaintiffs' motion, and ordered the Clerk to issue an alias summons, to which action of the Court the defendant then and there excepted.

Inasmuch as the nature of the defendant's objection to the granting of said motion for the issuance of an alias summons do not appear of record, defendant prays that this, its bill of exception, may be allowed.

JNO. E. McCALL,
U. S. Judge.

In the Circuit Court of the United States for the Western Division
of the Western District of Tennessee.

No. 4043.

RIFE & STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

*Motion on Behalf of the Defendant to Dispose of Special
Appearance.*

Filed May 26, 1910. D. F. Elliotte, Clerk.

Comes the defendant, the Lumber Underwriters, appearing specially for the purpose of this motion, and moves the Court to dispose of the Special Appearance filed herein on the 25 day of May, 1910, questioning the jurisdiction of the Court over the person of the defendant; and to dismiss the suit, for the reasons and upon the grounds set out in said Special Appearance.

TREZEVANT, BARTELS & TREZEVANT,

Att'ys for Def't.

Service of this motion accepted, and hearing set out Saturday,
June 2nd, 1910.

C. R. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Memoranda Opinion, McCall, Judge, Sustaining Respondents' Motion to Quash Service of Process on D. A. Fisher as Agent of Company.

Filed July 8, 1910. Dan F. Elliott, Clerk.

On May 25, 1910, the defendants, by special appearance for that purpose, filed a plea or motion, questioning the jurisdiction
19 of this Court over the persons of the defendants in this
case.

Subsequent to entering this special appearance, and before the question of jurisdiction as raised was disposed of by the Court, the plaintiff filed a written motion for an alias summons for the purpose of having the same served upon the Insurance Company, in order thereby to bring before the Court the persons of the Defendants. Over the objection of counsel for the defendants, the court granted the plaintiffs' motion, and ordered the issuance of an alias summons. This order was entered June 18, 1910.

Notwithstanding the order directing the issuance of the alias summons, counsel for the defendants press upon the court their view that the plea to the jurisdiction, filed May 25, 1910, should be disposed of.

While I see no necessity for doing so, yet there is no serious objection why it should not be done.

The plea or motion filed by the defendants, questioning the jurisdiction of the Court over the persons of the defendants, is in effect a motion to quash the service of the summons, upon the ground that D. A. Fisher, upon whom the process was served, was not authorized to accept or acknowledge service of process upon behalf of the Lumber Underwriters, or any of the individuals composing the association, and, therefore such service did not bring before the Court the defendants, or any of them.

After consideration, I am of the opinion that the motion to quash the service of process upon Mr. Fisher is well taken, and will be allowed.

However, upon an examination of the record, it appears that a motion has been made for the purpose, and an order granted, directing that an alias summons be issued, and that the parties plaintiff are making an effort to get proper service upon the defendants.

This will be taken at this time as an application to continue for

that purpose, and an order will be entered, continuing the case until the coming in of the alias summons, issued under the order of June 18, 1910.

The cost of the service of process upon D. A. Fisher will be paid by the plaintiff.

McCALL, *Judge*.

UNITED STATES OF AMERICA,
*Western Division of the
Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

20 Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1910, at the United States Court House in the City of Memphis, in said District, on to-wit: the 8th day of June, A. D. 1910, in the following cause, to-wit:

No. 4043.

L. C. RIFE et al.
VS.
LUMBER UNDERWRITERS.

This cause came on this day to be and was heard on defendants' motion that the Court dispose of the Special Appearance in the nature of a motion or plea questioning the jurisdiction of the Court over the person of the defendants, filed herein on May 25, 1910; and after consideration by the Court, said plea to the jurisdiction over the defendants' person is sustained, and the service of said original writ or summons is quashed and set aside and for naught held; but the suit will not abate or be dismissed, but will be retained for the purpose of enabling the plaintiffs to obtain proper service upon defendants. The defendants will have and recover of the plaintiffs and ——— their surety on the cost bond, the cost of the service of the original process.

The plaintiffs except to the above action of the Court in sustaining the plea and quashing the service.

The defendants except to so much of the action of the Court as refuses to dismiss the suit.

And the plaintiffs apply for a continuance of this cause, in view of the issuance of an alias summons in accordance with the order entered herein on June 18, 1910, said continuance being for the purpose of enabling plaintiffs to have said alias summons served upon the defendants, if possible, and the Court grants said application for a continuance, and the cause will be continued until the next term of this Court, for the purpose of affording plaintiffs an opportunity to have said alias summons executed.

Enter:

McCALL, *Judge*.

In the Circuit Court of the United States for the Western Division of
the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Declaration.

Filed Nov. 11, 1910. Dan. F. Elliotte, Clerk.

Now come the plaintiffs O. C. Rife and F. A. Stutzman, and
reforming the complaint filed in the Chancery Court of
21 Shelby County, Tennessee, and removed to this Court by
defendant so as to conform same to a pleading at law, they,
the said plaintiffs, aver that the Lumber Underwriters of New York
is an insurance corporation or association, doing business in Ten-
nessee through its agent, D. A. Fisher; plaintiffs aver that prior to
September 17th, 1909, they were engaged in the saw mill business
owning and operating a saw mill at Tribbett, Washington County,
Mississippi, and had been so owning and operating such saw mill
for a number of years prior thereto. Plaintiffs aver that on said
date their mill, lumber, stacking sticks, covering boards, founda-
tions, sheds, etc., were destroyed by fire or accidental origin, inflicting
upon plaintiffs a loss of approximately \$27,000.00.

Plaintiffs aver that they had \$7,000.00 insurance on said property
represented as follows:

Policy No. 27979 for \$2,000.00 issued by defendant on September
16th, 1909.

Policy No. 27868 for \$5,000.00 issued by defendant on May 22nd,
1909.

Said policies are here to the Court shown and are made the basis
of this suit.

Plaintiffs aver that at the time of said fire both of said policies
were in full force and effect and were issued through and by D. A.
Fisher, the duly authorized agent of said defendant in Memphis,
Tennessee.

Plaintiffs aver that each of said policies is a renewal of the previous
policy which had expired and that when the first policy antedating
either of the policies sued on here was procured from D. A. Fisher,
defendant's agent as aforesaid, said Fisher made inquiry as to the
distance between plaintiffs' mill and the fixed lumber stacks in the
mill yard and plaintiffs aver that said D. A. Fisher, agent aforesaid,
was informed that the said distance exceeded one hundred feet.

Plaintiffs aver that the first policies issued by defendant through
D. A. Fisher, agent aforesaid, contained what is known as a clear
space clause of one hundred feet between the lumber and the mill.

The said mill being the only "wood-working or manufacturing establishment" thereabouts.

Plaintiffs aver that while the policies preceding the two here sued on were in force and effect and contain the one hundred feet clear space clause, the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber and with especial reference to the distance between the lumber and the plaintiffs' mill.

Plaintiffs aver that the defendant had a plat showing the exact facts in that behalf.

Plaintiffs aver that policy No. 27868 for \$5,000.00 issued May 22nd, 1909, contained a statement to the effect that the assured warranted "a continuous clear space of one hundred feet" between the property insured and the mill, and plaintiffs aver that this was in accord with the statements made to the defendant's agent when previous or preceding policies had been procured and the rate of insurance of \$25.00 per \$1,000.00 with a clear space of one hundred feet was charged and paid.

Plaintiffs aver that in Policy No. 27979 for \$2,000.00 issued September 16th, 1909, the clear space clause aforesaid was made to provide for one hundred fifty feet clearance and the rate charged and paid was \$25 per \$1,000.00, that is to say, while the rate was unchanged the clear space provision was increased without the knowledge or consent of plaintiffs.

Plaintiffs aver that defendant knew at the time of the issuance of the above policy the exact conditions and knew that while plaintiffs had and maintained a clearance of one hundred feet or more that the plaintiffs did not have a clearance of one hundred and fifty feet and that the rate was not decreased and there was no material increase in the hazard and the clear space provision was fraudulently altered without plaintiffs' knowledge or authority and in the fact of what defendant knew to be the facts.

Plaintiffs aver that this policy No. 27979 was not delivered to plaintiffs now was same, ever in their possession but was delivered to Bennett & Witte and plaintiffs never at any time examined said policies and knew nothing whatever of the clear space clause inserted therein. Plaintiffs aver that the stipulation in the policy is in direct conflict with the facts stated by plaintiffs to the agent of defendant when the insurance was taken out and plaintiffs aver that upon their statement of a specific fact of such agent they were entitled to rest in the belief that he would not accept the premiums and issue plaintiffs a policy in conflict with what he was told and with what the defendant knew to be the facts, for to do so would be to take premiums from plaintiffs and yet furnish a policy that had no binding force on defendant.

Plaintiffs aver that defendant issued the policy with notice and knowledge of all the facts, said notice being conveyed from policy 27868, which showed the clearance plaintiffs expected to maintain; said notice consisted of a direct and specific statement of the facts to defendant's agent by plaintiffs; said

notice and knowledge arose from a plat in defendant's possession showing the facts and plaintiffs aver that one of the defendant's agents sent to the mill for the purpose of investigating and learning the facts did investigate and did learn that the clearance was not one hundred fifty feet whereby plaintiffs aver that the said provision was fraudulently inserted by defendant.

Plaintiffs aver that the actual clearance was approximately one hundred forty-three feet.

Plaintiffs aver that after the fire the defendant was duly notified thereof and it proceeded to investigation in the adjustment of said loss and W. A. Stone, the agent and adjuster of the defendant, finally and on the 1st day of November, 1909, wrote plaintiffs a letter declining to pay said loss on the sole and exclusive ground that the clear space clause contained in the policies had been violated and in said letter said agent and adjuster of the defendant and acting for it declined to consider a liability or adjust the loss. Said letter is in words and figures as follows, to-wit:

"MEMPHIS, TENN., Nov. 1st, 1909.

Messrs. Rife & Stutzman, Tribbett, Miss.

GENTLEMEN: Referring to your alleged claim for loss upon lumber destroyed by fire on the 17th of September, 1909, against the Lumber Underwriters, whose policies Nos. 27868 and 27979 you hold, I beg to call your attention to the Clear Space Clause attached to same, and made part of the contract. These clauses you have violated, and under the circumstances, the Company feels it has no liability, and respectfully declines to consider any claim against it.

Very truly yours,

WM. A. STONE, *Adjuster.*"

The original of said letter will be produced on or before the hearing.

Plaintiffs aver that said letter was mailed to Tribbett, Miss., and was returned to O. C. Rife, one of the plaintiffs a resident of Memphis, and who had the matter of said insurance adjustment in charge and was received by him on or about the 16th day of November, 1909.

Plaintiffs aver that the defendant knew that the clear space clause of policy No. 27868 had not been violated and the refusal to pay said policy was in bad faith and without any just cause and was for the sole purpose *or* wrongfully defeating a just liability to the plaintiffs. Plaintiffs aver that the defendant knew the facts as above set forth, which precluded the defendant from relying upon the clear space clause fraudulently and wrongfully inserted in policy No. 27979 and defendant knew that a refusal to pay the amount of the policy to the plaintiffs because of this clear space clause was an act of bad faith and was intended to be the assertion of an unjust and dishonest claim so as to defeat a legal liability.

Plaintiffs aver that the defendant by its wrongful refusal to pay plaintiffs violated Chapter 141 of the Acts of Tennessee of 1901, in

that said defendant doing an insurance business in Tennessee when the loss mentioned herein occurred refused to pay said loss within sixty days after demand was made upon defendant by plaintiffs as holders of said policies on which said loss occurred and that the refusal by the defendant to pay said loss was not in good faith and such failure to pay inflicted additional expenses, loss or injury upon plaintiffs, holders of said policies, and said additional expense, loss or injury inflicted upon plaintiffs amounted to twenty-five per cent of the amount of the policies.

Wherefore plaintiffs sue the defendants for the amount of said policies with interest from November 1st, 1909, and for twenty-five per cent additional liability incurred by reason of the statute and of the wrongful acts of the defendant and plaintiffs demand a jury to try the issues to be joined.

C. L. MARSILLIOT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

In the United States Court, Western Division, Western District,
State of Tennessee.

No. 4043.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS OF NEW YORK.

Filed November 30, 1910. Dan F. Elliotte, Clerk.

*Special Appearance to Question Jurisdiction of the Court Over the
Person of the Defendant.*

Now comes the defendant in the above styled cause, and appearing only for the purpose of questioning the jurisdiction of the Court over its person, and not generally, or for any other purpose, moves the Court to quash the alias writ or summons issued herein, and for cause of motion, says:

The original summons issued from the Chancery Court of Shelby County, required the Sheriff to summon, "Lumber Under-
25 writers of New York, D. A. Fisher, Agent, if to be found in your County, etc." This process was executed according to the return thereon, in the following manner, to-wit:

"Came to hand November 17, 1909. Executed November 20, 1909, on Lumber Underwriters of New York, by reading to D. A. Fisher, its Agent, etc., F. L. Monteverde, Sheriff."

Upon the filing of the record in the United States Court, and the filing of a Special Appearance in the nature of a plea in abatement, questioning the jurisdiction of the Court over the person of the defendant, by reason of the service of the original writ upon D. A. Fisher as Agent of the Lumber Underwriters, the plaintiffs moved the Court for an alias summons, which motion was granted, and the

alias summons issued and served by making known the contents thereof to the Insurance Commissioner of the State of Tennessee, at Nashville.

The only authority for the issuance of an alias summons in Tennessee is to be found in Section 5226 of Shannon's Code, wherein it is provided that as a necessary prerequisite to the issuance of such alias summons, the party summoned must be a resident of the County in which the suit is brought; and it must also appear that the original summons has been returned, "Not to be found in my County."

The original summons in this case was not returned, "Not to be found in my County," but was returned as executed.

The alias summons shows on its face that the defendant is not a resident of the County of Shelby, but a resident of the State of New York.

Defendant, therefore, says that there was no authority in law for the issuance of the alias summons, and prays the Court to quash the same, and dismiss the suit.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

R. L. Bartels certifies that he is counsel for the Lumber Underwriters in the above styled cause, and that, in his opinion, the motion to quash the alias writ set out in full above, is well founded in point of law.

R. L. BARTELS.

STATE OF TENNESSEE,
County of Shelby:

R. L. Bartels makes oath that he is counsel for the Lumber Underwriters in the above styled cause, and that the motion to quash the alias summons set out in full above, is not interposed for delay.

R. L. BARTELS.

26 Sworn to and subscribed before me this, the 30th day of November, 1910.

DAN F. ELLIOTTE, *Clerk.*

In the Circuit Court of the United States, Western District of Tennessee, Western District.

No. 4043, Page 189.

O. C. RIFE & F. A. STUTZMAN

vs.

LUMBER UNDERWRITERS ASSOCIATION OF NEW YORK.

Filed December 3, 1911.

Memoranda, McCall, Judge.

Dan F. Elliotte, *Clerk:*

In this case the motion to quash the alias writ is denied, and an order will be entered accordingly.

McCALL, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof, Begun and Held for its November Term, A. D. 1910, at the United States Court House in the City of Memphis, in said District, on To wit: the 3rd day of December, A. D. 1910, in the Following Cause, To wit:

No. 4043.

O. C. RIFE & F. A. STUTZMAN
VS.
LUMBER UNDERWRITERS OF NEW YORK.

The motion filed Nov. 30, 1909, to quash the alias writ or summons issued herein, is denied, to which action of the court, the defendant excepts.

Defendant is allowed five days from the entry of this order in which to further plead.

Enter:

McCALL, Judge.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE & F. A. STUTZMAN
VS.
LUMBER UNDERWRITERS OF NEW YORK.

Filed December 6th, 1910. Dan F. Elliotte, Clerk.

Praying Oyer.

27 Comes the defendant, and craves oyer of the two policies of insurance sued on herein and mentioned in the declaration; and moves the Court to require the plaintiffs to produce said instruments, and file same with the Clerk.

TREZEVANT, BARTELS & TREZEVANT, Att'ys.

Service of this motion accepted this, the 6 day of December, 1910, and policies filed in Court.

C. L. MARSILLIOT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof, Begun and Held for its November Term, A. D. 1910, at the United States Court House in the City of Memphis, in said District, on To wit: the 8th Day of December, A. D. 1910, in the Following Cause, To wit:

No. 4043.

O. C. RIFE and F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS ASSOCIATION OF NEW YORK.

Law Docket No. 4, Page 189.

Order Granting Additional Time Within Which to File Pleas.

It appearing to the Court upon statement of counsel for the defendant herein, that the pleas to be filed in this case under the law and the rule of the Court or required to be sworn to and that the party cognizant of the matters therein stated is a resident of the City of New York, and that it will be a matter of impossibility for these pleas to be sent to New York for signature and oath thereto and return within five (5) days originally allowed within which to plead, additional time of seven days (7) hereby allowed the defendant within which to file said pleas.

Enter:

McCALL, Judge.

O. K.

R. L. BARTELS, *Att'y for Def't.*

EWING, *Att'y for Pl't's.*

Circuit Court of the United States, Western District of Tennessee.

No. 4043.

O. C. RIFE and F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed Dec. 14, 1910. Dan. F. Elliotte, Clerk.

Now comes the defendant in the above styled cause, and pleads in abatement to the suit filed against it or them, and for cause of plea says:

The Lumber Underwriters of New York, the party defendant sued herein, is not incorporated. It is a voluntary association, composed of the fifteen individuals whose names are signed to the contracts of insurance sued upon.

The Lumber Underwriters of New York, as such, have no legal entity, and are not capable of being sued.

Wherefore, the suit should be abated and dismissed.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

E. F. Perry makes oath in due form of law that he is the Attorney-in-Fact for the Lumber Underwriters of New York, and one of said underwriters, and that the facts set out in the above plea are true in substance and in fact.

E. F. PERRY.

Sworn to and subscribed before me this, the 9th day of December, 1910.

[SEAL.]

H. F. STITT,
Notary Public, Rockland Co.

Certificate filed in N. Y. Co.

R. L. Bartels certifies that he is of counsel for the Lumber Underwriters of New York in the above styled cause, and that, in his opinion, the above plea in abatement is well founded in point of law; and that it is true in fact.

R. L. BARTELS.

STATE OF TENNESSEE,

County of Shelby:

Personally appeared before me, Dan F. Elliotte, R. L. Bartels, who made oath that he was of counsel for the defendant in the above styled cause, and that the plea in abatement herein is not interposed for delay.

R. L. BARTELS.

Sworn to and subscribed before me this, the 14th day of December, 1910.

DAN. F. ELLIOTTE, *Clerk.*

29 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed Dec. 15, 1910. Dan. F. Elliotte, Clerk.

Motion to Strike Out Plaintiffs' Plea in Abatement.

Come the plaintiff- and move the Court to strike out the plea in abatement filed herein by the defendant upon the ground that said plea in abatement is insufficient in law.

Plaintiffs further move the Court to strike said plea in abatement from the files because the defendant as an insurance association is doing business in the State of Tennessee and prior to the doing of business in the said State agreed in writing that the Insurance Commissioner of the State might accept service of process and the authority of said Insurance Commissioner is in no wise challenged.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 4043.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS ASSOCIATION OF NEW YORK.

Memoranda Opinion, McCall, J., Sustaining Motion to Strike Out Plea in Abatement.

Filed Dec. 27, 1910. Dan F. Elliotte, Clerk.

This case is before the Court upon the motion of the plaintiff to strike out the plea in abatement filed herein, on December 14th, 1910, upon two grounds:

1. That the plea in abatement filed by the defendant is insufficient in law.

2. Because defendant, as an insurance association, is doing business in the State of Tennessee, and prior to doing business in said State, agreed in writing that the Insurance Commissioner of said State might accept service of process, and the authority of said Insurance Commissioner is in no wise challenged.

For the purpose of considering the motion, the plea must be taken as true. Pleas in abatement are not favored in law, and are construed with great strictness. The Court will not supply omitted material averments, or cure defective ones by inference.

30 Any inference indulged in by the court must be against the pleader. It is the duty of the pleader to set forth in his plea in clear, definite and positive language the facts relied upon. All the authorities agree that great strictness and accuracy are required in pleas in abatement, and "no latitude in practice is extended to them.

154 Fed. 728.

Epperson v. State, 5 Lea 291.

Baker vs. Compton, 2 Head 471.

State vs. Bryant, 10 Yegg 527.

The plea in abatement in this case is as follows:

"The Lumber Underwriters of New York, the party defendant

sued herein, is not incorporated. It is a voluntary association, composed of the fifteen individuals whose names are signed to the contracts of insurance sued upon.

The Lumber Underwriters of New York, as such, have no legal entity, and are not capable of being sued."

When analyzed, this plea states, first, that the Lumber Underwriters of New York is not incorporated. Assuming this to be true, certainly it would not follow that it may not be a co-partnership, and as such subject to sue and be sued.

Second. The plea states that it is a voluntary association, composed of the fifteen individuals whose names are signed to the contracts of insurance sued upon. This is not an averment that it is not a co-partnership, because co-partnerships are voluntary associations, and as such they are subject to sue and be sued, and the additional allegation of this clause of the plea, as follows: "Composed of the fifteen individuals whose names are signed to the contracts of insurance sued upon," is not such *to the contracts of insurance sued upon*," is not such a statement of facts as discloses to the court that the Lumber Underwriters of New York is not a partnership.

The last paragraph, to-wit: "The Lumber Underwriters of New York have no legal entity and are not capable of being sued," is a mere conclusion of the pleader and not a statement of facts.

When this plea is measured by the rule applicable to pleas in abatement, as stated above, I think it is insufficient in law, and it follows, therefore, that the motion to strike out the plea in abatement because of its insufficiency in law is allowed.

The Plaintiffs, in their brief, make application to the court to be permitted to amend the writ by inserting the name of Eugene F. Perry, attorney for the Underwriters, and that supplemental process issue, returnable within thirty days.

31 The application to amend the writ by inserting the name of, and having summons issue for, Eugene F. Perry, attorney for the Underwriters, is allowed, and process returnable within thirty days will issue.

McCALL, Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof begun and held for its November Term, A. D. 1910, at the United States Court House, in the City of Memphis, in said District, on, to-wit, the 27th day of November, A. D. 1910, in the following cause, to-wit:

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS, an Association of New York.

D'k't No. 4, Page 189.

This cause came on to be heard upon the written motion of the plaintiffs, filed herein December 15, 1910, to strike from the files the plea in abatement.

And after argument by counsel and consideration by the Court, the Court is of the opinion that the motion is well taken, and it is hereby sustained and the plea in abatement of the defendants, filed December 14th, 1910, is stricken from the files, as being insufficient in law, to which action of the Court, the defendant then and there excepted.

And plaintiffs, in their counsel's brief, making application to the Court to be permitted to amend the writ by inserting the name of Eugene F. Perry, Attorney-in-fact for the Lumber Underwriters, the same is hereby allowed, and summons will issue for Eugene F. Perry, Attorney for the Lumber Underwriters, returnable within thirty days after its issuance. To the action of the Court in permitting this amendment, the defendants then and there excepted.

Enter:

McCALL.

The President of the United States of America to the Marshal of the Middle District of Tennessee, Greeting:

32 You are Hereby Commanded to Summon Eugene F. Perry, Attorney-in-fact for the Lumber Underwriters — respectfully, having their Home Office at No. 66, Broadway, in the City of New York, and doing business in the State of Tennessee, if to be found within your District, to appear before the judge of the Circuit Court of the United States, in the Sixth Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District, January 30th next, A. D. 1911, and then and there to answer O. C. Rife and F. A. Stutzman, doing business under the firm name and style of Rife & Stutzman, citizens of the States of Ten-

nessee and Mississippi, respectively, in a plea of tort to the damage of said plaintiffs (as they say) Eight thousand, seven hundred and fifty and No-100 Dollars (\$8,750.00). Herein fail not, and have you then and there this Writ.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, and the Seal of said Circuit Court, at said Memphis, this 26th day of December, A. D. 1910, and of the 135th year of American Independence.

DAN. F. ELLIOTTE, *Clerk.*

— — —, *D. C.*

Know All Men by these Presents, That we, O. C. Rife and F. A. Stutzman, as principal and as sureties, and W. S. A. Castles, — held and firmly bound unto said defendant Lumber Underwriters of New York, an association, etc., in the sum of Two Hundred and Fifty Dollars; but to be void on condition that the said defendant Lumber Underwriters of New York, an association, do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiffs in the Circuit Court of the United States for the Western District of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiffs to prosecute the said suit with effect; and also on failure of the defendants, if convicted, to pay said costs.

Witness our hands and seals, this 17th day of November, A. D. 1909.

RIFE & STUTZMAN,	[L. S.]
By O. C. RIFE.	[L. S.]
W. S. A. CASTLES.	[L. S.]

Approved and acknowledged before me, the 17th day of November, A. D. 1909.

33

Marshal's Return.

This Writ came to hand on Jan. 2nd, 1911, and I duly executed the same, as therein commanded, by making the contents thereof known to the within named defendant Reau E. Folk, State Insurance Agent at Nashville, Tennessee, on the 2nd day of Jan., 1911, A. D., and at the same time and place delivering to him a duly certified copy thereof, together with such copy of the declaration in this suit.

Nashville, Tennessee, Jan. 2nd, 1911, A. D.

JOHN W. OVERALL,
U. S. Marshal,
By R. L. SHIRLEY, *Deputy.*

No. 4043. D't No. 4. P. 189. U. S. Circuit Court, Western District Tennessee, Western Division. O. C. Rife & F. A. Stutzman, doing business as Rife & Stutzman, vs. Lumber Underwriters, No. 66 Broadway, New York. Amended Alias Summons. Returnable

to Jan'y 30 Term, A. D. 1911. Caruthers Ewing, Attorney, Memphis, Tenn. Returnable and filed at Memphis on the 5th day of Jan'y, A. D. 1911. Dan F. Elliotte, Clerk. — — —, D. C. No. 4043.

In the Circuit Court of the United States, Western Division of the Western District of Tennessee.

No. 4043.

RIPE AND STUTZMAN
VS.
LUMBER UNDERWRITERS.

Petition for a Rehearing on Motion to Strike Plea in Abatement from the Files.

Filed Jan. 3, 1910. Dan. F. Elliotte, Clerk.

To the Honorable John E. McCall, Judge:

Petitioner, the Defendant, respectfully shows to the court:

I.

That they are much aggrieved by the order of the Court rendered herein under memorandum opinion filed December 24, 1910, wherein and whereby the plea in abatement filed by the defendant, was stricken from the files, because of its insufficiency in law, and the complainant allowed to amend the process herein by adding or substituting a new defendant, to-wit, Eugene F. Perry, Attorney-in-fact.

II.

That the action of the Court, as shown by its opinion, was based upon the idea that a co-partnership could be sued in its firm name; and that inasmuch as the plea in abatement did not aver that the individuals composing the association of Lumber Under-
34 writers were not partners, the Court would draw the inference that they were partners.

III.

Petitioner respectfully submits that the Court is in error in holding that a co-partnership is subject to be sued as such—that is, as a legal entity. The rule of Common law—which is the rule existing in Tennessee, and in the Federal Courts (in the absence of a State statute)—is that a partnership is not a legal entity, and no suit can be maintained against a partnership except against the individual members thereof. (See brief annexed hereto.)

IV.

Petitioner further submits that the Court is in error in permitting an amendment of the process herein for the purpose of adding or substituting the name of a new party defendant.

If the plea in abatement be well taken no amendment can be made, because there is nothing to amend. If the plea be not well taken, the desired amendment is equivalent to bringing a new suit against a new party, which can only be done by an independent action, and not by the way of amendment. (See brief attached hereto for authorities.)

Prayer.

Petitioner therefore respectfully prays that your Honor will grant a rehearing of the motion to strike the plea in abatement from the files;

And that the Court reconsider its former opinion and holding, and sustain the plea in abatement, and dismiss the suit, if, upon issue joined, the facts are found to be true.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

R. L. Bartels certifies that he is of counsel for the petitioner herein, and that in his opinion, the petition is well founded in law. He also certifies that the filing of the petition is not interposed for delay.

R. LEE BARTELS.

Service of this petition and copy accepted this the 3 day of January, 1911.

CARUTHERS EWING, *Att'y.*

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District, in the Sixth Judicial Circuit Thereof.

35 Proceedings had in said Court at a regular term thereof begun and held for its November Term, A. D. 1910, at the United States Court House, in the City of Memphis, in said District, on, to-wit, the 7th day of January, A. D. 1911, in the following cause, to-wit:

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

The petition of the Lumber Underwriters to rehear the plea in abatement, which petition was filed herein January, 3rd, 1911, is dismissed and defendant excepted.

In the Circuit Court of the United States for the Western Division
of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed Jan. 30, 1911. Dan. F. Elliotte, Clerk.

Demurrer.

Now come the Lumber Underwriters of New York, and demur to the declaration filed against them in the above styled cause, and for ground of demurrer, say:

The contracts made the basis of this suit provide:

"In case of action brought to enforce the provisions of this policy, same shall be brought against the Attorney for the Underwriters as representing all of said Underwriters * * *."

The suit cannot, therefore, under the above quoted provisions, be maintained against the Lumber Underwriters as such, but must alone be brought against their Attorney-in-fact, E. F. Perry.

Wherefore, the defendant, Lumber Underwriters, demurs and prays the judgment of the Court upon the demurrer.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

R. L. Bartels certifies that he is of counsel for the Lumber Underwriters, and that, in his opinion, the foregoing demurrer is well founded in point of law.

R. L. BARTELS.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed Jan. 30, 1911. Dan. F. Elliotte, Clerk.

36

Motion.

Comes E. F. Perry, Attorney-in-Fact for the Lumber Underwriters of New York, an association of individuals, not incorporated, and moves the Court to require the plaintiffs to reform their declaration, so as to declare in separate counts with reference to the two

contracts of insurance sued upon, which, as can be seen from reference thereto, are separate and distinct from each other, each containing material provisions different from the other; or, on failure thereof, to strike the declarations from the filed.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

R. L. Bartels certifies that he is of counsel for E. F. Perry, Attorney-in-Fact, for the Lumber Underwriters, and that, in his opinion, the above motion is well founded in law. He also makes oath that said motion is not interposed for delay.

R. L. BARTELS.

Sworn to and subscribed before me, this 30 day of January, 1911.

DAN. F. ELLIOTTE, *Clerk.*

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1910, at the United States Court House in the City of Memphis, in said District, on to-wit, the 4th day of February, A. D. 1910, in the following cause, to-wit:

No. 4043.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS.

This cause was heard on the demurrer of Lumber Underwriters to the declaration, which said demurrer was filed January 30th, 1911, and the same is overruled and defendant excepts.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

vs.

LUMBER UNDERWRITERS OF NEW YORK.

Filed Feb. 6, 1911. Dan. F. Elliotte, Clerk.

Declaration.

First Count.

Now come the plaintiffs, O. C. Rife and F. A. Stutzman, and reforming the complaint filed in the Chancery Court of Shelby

County, Tennessee, and removed to his Court by defendant so as to conform to a pleading at law, and separating the declaration into counts, on defendant's demand, so that each count sets out a right on each policy, and basing this count on policy No. 27868, for \$5,000.00, hereinafter mentioned, they, the said plaintiffs, aver that the Lumber Underwriters of New York is an insurance corporation or association, doing business in Tennessee through its agent, D. A. Fisher; plaintiffs aver that prior to September 17th, 1909, they were engaged in the saw mill business owning and operating a saw mill at Tribbett, Washington County, Mississippi, and had been so owning and operating such saw mill for a number of years prior thereto. Plaintiffs aver that on said date their mill, lumber, stacking sticks, covering boards, foundations, sheds, etc., were destroyed by fire of accidental origin, inflicting upon plaintiffs a loss of approximately \$27,000.00.

Plaintiffs aver that they had \$7,000.00 insurance on said property represented as follows:

Policy No. 27979 for \$2,000.00 issued by defendant on September 16th, 1909.

Policy No. 27868 for \$5,000.00 issued by defendant on May 22nd, 1909.

Said policies are here to the Court shown and are made the basis of this suit.

Plaintiffs aver that at the time of said fire both of said policies were in full force and effect and were issued through and by D. A. Fisher, the duly authorized agent of said defendant in Memphis, Tennessee.

Plaintiffs aver that each of said policies is a renewal of the previous policy which had expired and that when the first policy antedating either of the policies sued on here was procured from D. A. Fisher, defendant's agent as aforesaid, said Fisher made inquiry as to the distance between plaintiffs' mill and the fixed lumber stacks in the mill yard and plaintiffs aver that said D. A. Fisher, agent aforesaid, was informed that the said distance exceeded one hundred feet.

Plaintiffs aver that the first policies issued by defendant through D. A. Fisher, agent aforesaid, contained what is known as a clear space clause of one hundred feet between the lumber and the mill. The said mill being the only "wood-working or manufacturing establishment" thereabouts.

38 Plaintiffs aver that while the policies preceding the two here sued on were in force and effect and contain the one hundred feet clear space clause, the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber and with especial reference to the distance between the lumber and plaintiffs' mill.

Plaintiffs aver that the defendant had a plat showing the exact facts in that behalf.

Plaintiffs aver that policy No. 27868 for \$5,000.00 issued May 22nd, 1909, contained a statement to the effect that the assured

warranted "a continuous clear space of one hundred feet" between the property insured and the mill, and plaintiffs aver that this was in accord with the statements made to the defendant's agent when previous or preceding policies had been procured and the rate of insurance of \$25.00 per \$1,000.00 with a clear space of one hundred feet was charged and paid.

Plaintiffs aver that in policy No. 27979 for \$2,000.00 issued September 16th, 1909, the clear space clause aforesaid was made to provide for one hundred fifty feet clearance and the rate charged and paid was \$25.00 per \$1,000.00, that is to say, while the rate was unchanged the clear space provision was increased without the knowledge or consent of plaintiffs.

Plaintiffs aver that defendant knew at the time of the issuance of the above policy the exact conditions and knew that while plaintiffs had and maintained a clearance of one hundred feet or more that the plaintiffs did not have a clearance of one hundred and fifty feet and that the rate was not decreased and there was no material increase in the hazard and the clear space provision was fraudulently altered without plaintiffs' knowledge or authority and in the face of what defendant knew to be the facts.

Plaintiffs aver that this policy No. 27979 was not delivered to plaintiffs nor was same ever in their possession but was delivered to Bennett & Witte and plaintiffs never at any time examined said policies and knew nothing whatever of the clear space clause inserted therein. Plaintiffs aver that the stipulation in the policy is in direct conflict with the facts stated by plaintiffs to the agent of defendant when the insurance was taken out and plaintiffs aver that upon their statement of a specific fact to such agent they were entitled to rest in the belief that he would not accept the premiums and issue plaintiffs a policy in conflict with what he was told and with what the defendant knew to be the facts. for to do so would
39 be to take premiums from plaintiffs and yet furnish a policy that had no binding force on defendant.

Plaintiffs aver that defendant issued the policy with notice and knowledge of all the facts, said notice being conveyed from policy 27868, which showed the clearance plaintiffs expected to maintain; said notice consisted of a direct and specific statement of the facts to defendant's agent by plaintiffs; said notice and knowledge arose from a plat in defendant's possession showing the facts and plaintiffs aver that one of defendant's agents sent to the mill for the purpose — investigating and learning the facts did investigate and did learn that the clearance was not one hundred fifty feet whereby plaintiffs aver that the said provision was fraudulently inserted by defendant.

Plaintiffs aver that the actual clearance was approximately one hundred forty-three feet.

Plaintiffs aver that after the fire the defendant was duly notified thereof and it proceeded to investigation in the adjustment of said loss and W. A. Stone, the agent and adjuster of the defendant, finally and on the 1st day of November, 1909, wrote plaintiffs a letter declining to pay said loss on the sole and exclusive ground that

the clear space clause contained in the policies had been violated and in said letter said agent and adjuster of the defendant and acting for it declined to consider a liability or adjust the loss. Said letter is in words and figures as follows, to-wit:

"MEMPHIS, TENN., Nov. 1, 1909.

Messrs. Rife & Stutzman, Tribbett, Miss.

GENTLEMEN: Referring to your alleged claim for loss upon lumber destroyed by fire on the 17th of September, 1909, against the Lumber Underwriters, whose policies Nos. 27868 and 27979 you hold, I beg to call your attention to the Clear Space Clause attached to same, and made part of the contract. These clauses you have violated, and under the circumstances, the Company feels it has no liability, and respectfully declines to consider any claim against it.

Very truly yours,

WM. A. STONE, *Adjuster.*"

The original of said letter will be produced on or before the hearing.

Plaintiffs aver that said letter was mailed to Tribbett, Miss., and was returned to O. C. Rife, one of the plaintiffs a resident of Memphis, and who had the matter of said insurance adjustment in charge and was received by him on or about the 16th day of November, 1909.

40 Plaintiffs aver that the defendant knew that the clear space clause of policy No. 27868 had not been violated and the refusal to pay said policy was in bad faith and without any just cause and was for the sole purpose or wrongfully defeating a just liability to the plaintiffs. Plaintiffs aver that the defendant knew the facts as above set forth, which precluded the defendant from relying upon the clear space clause fraudulently and wrongfully inserted in policy No. 27979 and defendant knew that a refusal to pay the amount of the policy to the plaintiffs because of this clear space clause was an act of bad faith and was intended to be the assertion of an unjust and dishonest claim so as to defeat a legal liability.

Plaintiffs aver that the defendant by its wrongful refusal to pay plaintiffs violated Chapter 141 of the Acts of Tennessee of 1901, in that said defendant doing an insurance business in Tennessee when the loss mentioned herein occurred refused to pay said loss within sixty days after demand was made upon defendant by plaintiffs as holders of said policies on which said loss occurred and that the refusal by defendant to pay said loss was not in good faith and such failure to pay inflicted additional expense, loss or injury upon plaintiffs, holders of said policies, and said additional expense, loss or injury inflicted upon plaintiffs amounted to twenty-five per cent of the amount of the policies.

Wherefore plaintiffs sue the defendant for the amount of said policies with interest from November 1st, 1909, and for twenty-five per cent additional liability incurred by reason of the statute and of the wrongful acts of the defendant and plaintiffs make said policy

No. 27868 for \$5,000.00 as the basis of this count and demand a jury to try the issues to be joined.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

Second Count.

Now come the plaintiffs, O. C. Rife and F. A. Stutzman, and reforming the complaint filed in the Chancery Court of Shelby County, Tennessee, and removed to this Court by defendant so as to conform same to a pleading at law, and separating the declaration into counts, on defendant's demand, so that each count sets out a right on each policy, and basing this count on policy No. 27979, for \$2,000.00, hereinafter mentioned, they, the said plaintiffs, aver that the Lumber Underwriters of New York is an insurance corporation or association, doing business in Tennessee through its agent, D. A. Fisher; plaintiffs aver that prior to September 17th, 1909, they were engaged in the saw mill business owning and operating a saw mill at Tribbett, Washington County, Mississippi, and had been so owning and operating such saw mill for a number of years prior thereto. Plaintiffs aver that on said date their mill, lumber, stacking sticks, covering boards, foundations, sheds, etc., were destroyed by fire of accidental origin, inflicting upon plaintiffs a loss of approximately \$27,000.00.

Plaintiffs aver that they had \$7,000.00 insurance on said property represented as follows:

Policy No. 27979 for \$2,000.00 issued by defendant on September 16th, 1909.

Policy No. 27868 for \$5,000.00 issued by defendant on May 22nd, 1909.

Said policies are here to the Court shown and are made the basis of this suit.

Plaintiffs aver that at the time of said fire both of said policies were in full force and effect and were issued through and by D. A. Fisher, the duly authorized agent of said defendant in Memphis, Tennessee.

Plaintiffs aver that each of said policies is a renewal of the previous policy which had expired and that when the first policy antedating either of the policies sued on here was procured from D. A. Fisher, defendant's agent as aforesaid, said Fisher made inquiry as to the distance between plaintiffs' mill and the fixed lumber stacks in the mill yard and plaintiffs aver that said D. A. Fisher, agent aforesaid, was informed that the said distance exceeded one hundred feet.

Plaintiffs aver that the first policies issued by defendant through D. A. Fisher, agent aforesaid, contained what is known as a clear space clause of one hundred feet between the lumber and the mill. The said mill being the only "wood-working or manufacturing establishment" thereabouts.

Plaintiffs aver that while the policies preceding the two here sued on were in force and effect and contain the one hundred feet clear

space clause, the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber and with especial reference to the distance between the lumber and plaintiffs' mill.

Plaintiffs aver that the defendant had a plat showing the exact facts in that behalf.

42 Plaintiffs aver that policy No. 27868 for \$5,000.00 issued May 22nd, 1909, contained a statement to the effect that the assured warranted "a continuous clear space of one hundred feet" between the property insured and the mill, and plaintiffs aver that this was in accord with the statements made to the defendant's agent when previous or preceding policies had been procured and the rate of insurance of \$25.00 per \$1,000.00 with a clear space of one hundred feet was charged and paid.

Plaintiffs aver that in policy No. 27979 for \$2,000.00 issued September 18th, 1909, the clear space clause aforesaid was made to provide for one hundred fifty feet clearance and the rate charged and paid was \$25.00 per \$1,000.00, that is to say, while the rate was unchanged the clear space provision was increased without the knowledge or consent of plaintiffs.

Plaintiffs aver that defendant knew at the time of the issuance of the above policy the exact conditions and knew that while plaintiffs had and maintained a clearance of one hundred feet or more that the plaintiffs did not have a clearance of one hundred and fifty feet and that the rate was not decreased and there was no material increase in the hazard and the clear space provision was fraudulently altered without plaintiffs' knowledge or authority and in the face of what defendant knew to be the facts.

Plaintiffs aver that this policy No. 27979 was not delivered to plaintiffs nor was same ever in their possession but was delivered to Bennett & Witte and plaintiffs never at any time examined said policies and knew nothing whatever of the clear space clause inserted therein. Plaintiffs aver that the stipulation in the policy is in direct conflict with the facts stated by plaintiffs to the agent of defendant when the insurance was taken out and plaintiffs aver that upon their statement of a specific fact to such agent they were entitled to rest in the belief that he would not accept the premiums and issue plaintiffs a policy in conflict with what he was told and with what the defendant knew to be the facts, for to do so would be to take premiums from plaintiffs and yet furnish a policy that had no binding force on defendant.

Plaintiffs aver that defendant issued the policy with notice and knowledge of all the facts, said notice being conveyed from policy 27868, which showed the clearance plaintiffs expected to maintain; said notice consisted of a direct and specific statement of the facts to defendant's agent by plaintiffs; said notice and knowledge arose from a plat in defendants' possession showing the facts and plaintiffs aver that one of defendant's agents sent to the mill for
43 the purpose — investigating and learning the facts did investigate and did learn that the clearance was not one hun-

dred fifty feet whereby plaintiffs aver that the said provision was fraudulently inserted by defendant.

Plaintiffs aver that the actual clearance was approximately one hundred forty-three feet.

Plaintiffs aver that after the fire the defendant was duly notified thereof and it proceeded to investigation in the adjustment of said loss and W. A. Stone, the agent and adjuster of the defendant, finally and on the 1st day of November, 1909, wrote plaintiffs a letter declining to pay said loss on the sole and exclusive ground that the clear space clause contained in the policies had been violated and in said letter said agent and adjuster of the defendant and acting for it declined to consider a liability or adjust the loss. Said letter is in words and figures as follows, to-wit:

"MEMPHIS, TENN., Nov. 1st, 1909.

Messrs. Rife & Stutzman, Tribbett, Miss.

GENTLEMEN: Referring to your alleged claim for loss upon lumber destroyed by fire on the 17th of September, 1909, against the Lumber Underwriters, whose policies Nos. 27868 and 27979 you hold, I beg to call your attention to the Clear Space Clause attached to same, and made part of the contract. These clauses you have violated, and under the circumstances, the Company feels it has no liability, and respectfully declines to consider any claim against it.

Very truly yours,

WM. A. STONE, *Adjuster.*"

The original of said letter will be produced on or before the hearing.

Plaintiffs aver that said letter was mailed to Tribbett, Miss., and was returned to O. C. Rife, one of the plaintiffs a resident of Memphis, and who had the matter of said insurance adjustment in charge and was received by him on or about the 16th day of November, 1909.

Plaintiffs aver that the defendant knew that the clear space clause of policy No. 27868 had not been violated and the refusal to pay said policy was in bad faith and without any just cause and was for the sole purpose or wrongfully defeating a just liability to the plaintiffs. Plaintiffs aver that the defendant knew the facts as above set forth, which precluded the defendant from relying upon the clear space clause fraudulently and wrongfully inserted in policy No. 27979 and defendant knew that a refusal to pay the
44 amount of the policy to the plaintiffs because of this clear space clause was an act of bad faith and was intended to be the assertion of an unjust and dishonest claim so as to defeat a legal liability.

Plaintiffs aver that the defendant by its wrongful refusal to pay plaintiffs violated Chapter 141 of the Acts of Tennessee of 1901, in that said defendant doing an insurance business in Tennessee when the loss mentioned herein occurred refused to pay said loss within sixty days after demand was made upon defendant by plaintiffs as holders of said policies on which said loss occurred and

that the refusal by defendant to pay said loss was not in good faith and such failure to pay inflicted additional expense, loss or injury upon plaintiffs, holders of said policies, and said additional expense, loss or injury inflicted upon plaintiffs amounted to twenty-five per cent of the amount of the policies.

Wherefore plaintiffs sue the defendant for the amount of said policies with interest from November 1st, 1909, and for twenty-five per cent additional liability incurred defendant and plaintiffs make said policy No. 27979 for \$2,000.00 as the basis of this count and demand a jury to try the issues to be joined.

C. L. MARSILLIOTT.
CARUTHERS EWING.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043, T. D.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Pleas of Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters.

Filed Feb. 23, 1911. Dan. F. Elliotte, Clerk.

Comes the defendant, Eugent F. Perry, as Attorney-in-Fact for the Lumber Underwriters of New York, and for plea to the declaration filed herein, says:

I.

Each of the contracts of insurance sued upon contains the following provision:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of Law or equity * * * unless commenced within twelve months next after the fire."

The fire which destroyed the property insured by said policies occurred on September 17, 1909. This suit was not commenced against this defendant until December 26, 1910.

45 Defendant, Eugene F. Perry, Attorney-in-Fact for the Lumber Underwriters of New York, pleads the contractual limitation of one year in bar of this suit.

II.

For further plea, defendant Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says:

The "Lumber Underwriters of New York" was the original and only defendant sued herein. The "Lumber Underwriters of New York" was and is sued as a legal entity. Subsequently, to-wit, on

the 26th day of December, 1910, the process was amended, and Eugene F. Perry, Attorney-in-Fact for the Lumber Underwriters was made a defendant, and supplemental process then issued against him.

The "Lumber Underwriters of New York," is not, and was not at the commencement of this action, a legal entity. It is not incorporated, and was not incorporated at the commencement of this action. It is not a joint stock company, and was not a joint stock company at the commencement of this action. Fifteen individuals, whose names are signed to the contracts sued upon, voluntarily associated themselves together, for the purpose of underwriting lumber and wood-working plants against loss by fire. They have not now, and they did not have at the commencement of this action, any legal existence as an association or company, or as "Lumber Underwriters of New York."

The amendment of date December 26, 1910, making Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, a party defendant, was the commencement of this action against Eugene F. Perry, Attorney-in-Fact. Each of the policies of insurance provide:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of Law or equity * * * unless commenced within twelve months next after the fire."

Defendant Eugene F. Perry, Attorney-in-Fact for the Lumber Underwriters, pleads the limitation of one year in bar of this suit.

III.

For further plea, Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says:

They do not owe the plaintiffs, as plaintiffs have in their declaration alleged.

IV.

For further plea, Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says:

They did not promise or agree with the plaintiffs, as the plaintiffs have in the declaration alleged.

46

V.

For further plea, Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says:

They deny all of the material allegations in plaintiffs' declaration contained.

VI.

For further plea, Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says:

Both of the policies of insurance sued upon contain a covenant of warranty, on the part of the plaintiffs, that a clear space would be maintained between the property insured—the lumber, and the saw mill—that is to say, under policy No. 27868, the Insured agreed

to maintain a 100-foot clear space, and under policy No. 27979, they agreed to maintain a clear space of 150 feet.

This defendant avers that each of said covenants of warranty was breached by the insured, in that at the time of the fire, the plaintiffs did not have a clear space of either 150 feet or a clear space of 100 feet.

VII.

For further plea, Eugene F. Perry, Attorney-in-Fact for Lumber Underwriters, says, with reference to policy No. 27979 for \$2,000.00, issued September 16, 1909:

This policy was never in force. There was no meeting of the minds of the parties prior to the fire, with reference to this policy of insurance; and the policy, itself, was not delivered or accepted until after the property mentioned therein had been destroyed by fire. Subsequent to the fire, this policy of insurance was delivered to the Insured by D. A. Fisher, the local agent of the defendant, without the knowledge of or authority from these defendants.

And they further say, that at the time of the letter addressed to Rife and Stutzman by W. A. Stone, their adjuster, denying liability upon the ground of breach of warranty as to clear space, that W. A. Stone had no knowledge of the fact that said policy of insurance No. 27979, had not been delivered until after the fire. And they further say that if said W. A. Stone did have such knowledge, it could not affect the right of this defendant to make the defense set up in this plea.

TREZEVANT, BARTELS & TREZEVANT, Att'ys.

R. L. Bartels certifies that he is of counsel for the defendants in this cause, and that, in his opinion, the above pleas are well founded in point of law.

R. L. BARTELS.

47 Eugene F. Perry makes oath that the above pleas are not interposed for delay; and that the facts set out in said pleas are true.

EUGENE F. PERRY.

Sworn to and subscribed before me, this the 20th day February, 1911.

[SEAL.]

H. F. STITT,
Notary Public.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Pleas of Lumber Underwriters.

Filed Feb. 23, 1911. Dan. F. Elliotte, Clerk.

Comes the defendant, Lumber Underwriters of New York, sued as a legal entity, and, pursuant to orders of the Court, pleads to the declaration filed against it or them, and for cause of plea, says:

I.

The "Lumber Underwriters of New York" is not now, and was not at the commencement of this suit, a legal entity. It is not now incorporated, and was not incorporated at the commencement of this suit; neither is it now a joint stock company, nor was it a joint stock company at the commencement of this suit. Fifteen individuals, whose names are signed to the contract sued upon, voluntarily associated themselves together, for the purpose of underwriting lumber and wood-working plants against loss by fire. They have no legal existence as an association or company.

Lumber Underwriters of New York pleads this want of legal capacity in bar of this suit.

II.

For further plea, Lumber Underwriters of New York, say:

The contracts sued upon *each* provide:

"In case of action brought to enforce the provisions of this policy, same shall be brought against the attorney for the Underwriters representing all of said underwriters, * * *."

The attorney referred to signed said contracts and is one of the underwriters who have obligated themselves under them.

48 The above provision is a condition precedent to the right of plaintiffs to maintain suit on the contracts against either the Lumber Underwriters as an association or entity, or against the fifteen underwriters as individuals.

Said provision is pleaded in bar to this suit against the Lumber Underwriters.

III.

For further plea, Lumber Underwriters of New York, say:

They do not owe the plaintiffs, as plaintiffs have in their declaration alleged.

IV.

For further plea, Lumber Underwriters say:

They did not promise or agree with the plaintiffs, as the plaintiffs have in their declaration alleged.

V.

For further plea, Lumber Underwriters say:

They deny all of the material allegations in plaintiffs' declaration contained.

VI.

For further plea, Lumber Underwriters say:

Both of the policies of insurance sued upon contain a covenant of warranty, on the part of the plaintiffs, that a clear space would be maintained between the property insured—the lumber, and the saw mill—that is to say, under policy No. 27868, the Insured agreed to maintain a 100-foot clear space, and under policy No. 27979, they agreed to maintain a clear space of 150 feet.

This defendant avers that each of said covenants of warranty was breached by the insured, in that at the time of the fire, the plaintiffs did not have a clear space of either 150 feet or a clear space of 100 feet.

VII.

For further plea, Lumber Underwriters say, with reference to policy No. 27979 for \$2,000.00, issued September 16, 1909:

This policy was never in force. There was no meeting of the minds of the parties prior to the fire, with reference to this policy of insurance; and the policy, itself, was not delivered or accepted until after the property mentioned therein had been destroyed by fire. Subsequent to the fire, this policy of insurance was delivered to the Insured by D. A. Fisher, the local agent of the defendant, without the knowledge of or authority from these defendants.

And they further say, that at the time of the letter addressed to Rife & Stutzman by W. A. Stone, their adjuster, denying liability upon the ground of breach of warranty as to clear space, that W. A.

Stone had no knowledge of the fact that said policy of insurance No. 27979, had not been delivered until after the fire. And they further say that if said W. A. Stone did have such knowledge, it could not affect the right of this defendant to make the defense set up in this plea.

TREZEVANT, BARTELS & TREZEVANT, *Att'ys.*

R. L. Bartels certifies that he is of counsel for the defendants in this cause, and that, in his opinion, the above pleas are well founded in point of law.

R. L. BARTELS.

Eugene F. Perry makes oath that the above pleas are not interposed for delay; and that the facts set out in said pleas are true.

EUGENE F. PERRY.

Sworn to and subscribed before me, this the 20th day February, 1911.

[SEAL.]

H. F. STITT,
Notary Public.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Motion — Strike Out Pleas.

Filed March 1, 1911. Dan. F. Elliotte, Clerk.

The Plaintiffs move the Court to strike out the following pleas filed herein by the Lumber Underwriters:

1.

- (1) The first plea because insufficient and stating no defense.
- (2) Said plea states an erroneous legal conclusion.
- (3) The matters presented by said plea have already been passed upon by this Court.

2.

- (1) The second plea because insufficient and stating no defense.
- (2) The "attorney for the underwriters" is sued herein and is a party to this suit, wherefore said contract provision is complied with.

3.

- (1) The fourth plea is insufficient as a plea of non est factum.
- (2) Said plea does not aver that the contracts sued on were not executed and made by authority of defendant Lumber Underwriters.

50

4.

The fifth plea as a repetition of the third plea and insufficient in law.

5.

- (1) The sixth plea as duplex.
- (2) The said plea is bad for duplicity in that it undertakes to plead a violation of the clearance clause of 100 feet in policy No. 27868 and a violation of the clearance clause of 150 feet in policy No. 27979.
- (3) As to policy No. 27979, with reference to clearance of 150 feet, the plea is insufficient in that it fails to state that defendant

was not advised or did not know the actual clearance when said policy was issued.

(4) The said plea states no defense to the allegations of the declaration in this behalf.

6.

(1) The seventh plea as insufficient in law.

(2) Said plea does not set out any fact or facts from which the Court can say that defendant's legal conclusion that D. A. Fisher, defendant's agent, had no authority to deliver the plaintiffs' policy No. 27979 is or is not sound.

(3) Said plea states only conclusions of law in so far as relates to the existence of the insurance contract, lack of authority of agent, etc.

(4) Said plea is insufficient in that the defendant's liability is not measured by the fact or date of delivery of the policy but by the contract of which the policy is but evidence.

(5) Said plea does not aver that on ascertaining that D. A. Fisher, the agent of defendant, had acted without authority the defendant disaffirmed his act.

Wherefore, plaintiffs move that said above mentioned pleas be stricken out.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

Copy of above motion delivered to attorneys for defendant.
March 1, 1911.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043, T. D.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Motion to Strike Out Pleas.

Filed March 1, 1911. Dan. F. Elliotte, Clerk.

51 The plaintiffs move the court to strike out the following
pleas filed herein by Eugene F. Perry, attorney in fact for
the Lumber Underwriters of New York.

1.

(1) The first plea because the record shows that this suit was
instituted on November 17th, 1909.

(2) The suit was instituted within twelve months of the fire.

(3) The policy limitation set out in said plea is void.

2.

- (1) The second plea states erroneous conclusions of law.
- (2) The said plea is insufficient in law.
- (3) The matters and things therein pleaded have already been adjudicated herein.

3.

- (1) The fourth plea is insufficient as a plea of non est factum.
- (2) Said plea does not aver that the contracts sued on were not executed and made by authority of defendant Lumber Underwriters.

4.

The fifth plea as a repetition of the third plea and insufficient in law.

5.

- (1) The sixth plea as duplex.
- (2) The said plea is bad for duplicity in that it undertakes to plead a violation of the clearance clause of 100 feet in policy No. 27868 and a violation of the clearance clause of 150 feet in policy No. 27979.
- (3) As to policy No. 27979, with reference to clearance of 150 feet, the plea is insufficient in that it fails to state that defendant was not advised or did not know the actual clearance when said policy was issued.
- (4) The said plea states no defense to the allegations of the declaration in this behalf.

6.

- (1) The seventh plea as insufficient in law.
- (2) Said plea does not set out any fact or facts from which the Court can say that defendant's legal conclusion that D. A. Fisher, defendant's agent, had no authority to deliver the plaintiff's policy No. 27979 is or is not sound.
- (3) Said plea states only conclusions of law in so far as relates to the existence of the insurance contract, lack of authority of agent, etc.
- (4) Said plea is insufficient in that the defendant's liability is not measured by the fact or date of delivery of the policy
52 but by the contract of which the policy is but evidence.
- (5) Said plea does not aver that on ascertaining that D. A. Fisher, the agent of defendant, had acted without authority the defendant disaffirmed his act.

Wherefore, plaintiffs move that said above mentioned pleas be stricken out.

C. L. MERSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

Copy of above motion delivered to attorneys for defendant, March 1, 1911.

UNITED STATES OF AMERICA,
*Western Division of the
Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its November Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 4th day of March, A. D. 1911, in the following cause, to-wit:

No. 4043, T. D.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

This day came the parties by their attorneys and the Court heard and considered the motion of the plaintiffs to strike out certain pleas of the Lumber Underwriters and the motion of the plaintiffs to strike out certain pleas of Eugene F. Perry, and the Court orders, adjudges and decrees on said motions as follows:

Plea No. 1 of the Lumber Underwriters is stricken out as irrelevant.

Plea No. 2 of the Lumber Underwriters is stricken out as irrelevant.

Plea No. 4 of the Lumber Underwriters is stricken out as irrelevant, and insufficient.

Plea No. 5 of the Lumber Underwriters is stricken out as irrelevant.

Plea No. 6 of the Lumber Underwriters is stricken out as irrelevant.

In connection with plea No. 6 the Lumber Underwriters, at the hearing, agreed that possibly the said plea was duplex and asked leave of the Court to separate said sixth plea into two distinct pleas and to avoid duplicity and by consent of parties this was
53 treated as though actually done, and the plea stricken out, not because of duplicity, but because it was irrelevant.

Plea No. 7 of the Lumber Underwriters is stricken out as irrelevant.

Plea No. 1 of Eugene F. Perry, Attorney in fact, is stricken out as irrelevant.

Plea No. 2 of Eugene F. Perry, Attorney in fact, is stricken out as irrelevant.

Plea No. 4 of Eugene F. Perry, Attorney in fact, is stricken out as irrelevant and insufficient.

Plea No. 5 of Eugene F. Perry, Attorney in fact, is stricken out as irrelevant.

Plea No. 6 of Eugene F. Perry, Attorney in fact, is stricken out

as irrelevant and the same agreement was made and action taken thereon as on plea No. 6 of the Lumber Underwriters.

Plea No. 7 of Eugene F. Perry, Attorney in Fact, is stricken out as irrelevant.

To the above action of the Court Eugene F. Perry, Attorney in fact, excepted and the Lumber Underwriters likewise excepted, each exception to the Court's action with reference to the particular pleas of each defendant.

Enter:

McCALL, J.

O. K.
EWING.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043. T. D.

RIFE & STUTZMAN
vs.
LUMBER UNDERWRITERS.

Filed June 6, 1911. Dan. F. Elliotte, Clerk.

To O. C. Rife and F. A. Stutzman, or to their Attorneys of Record,
C. L. Marsilliott and Caruthers Ewing:

Please take notice that — the trial of the above styled case on June 12, 1911, you are requested to furnish the original of the following letters, to-wit:

Letter written by D. A. Fisher, addressed to Rife & Stutzman, Tribbett, Miss., of date July 24th, 1905, relating to the original insurance taken out by Rife & Stutzman with Mr. Fisher, rate of premium to be charged, etc.

Letter written by D. A. Fisher, addressed to Rife & Stutzman, Tribbett, Miss., of date September 17th, 1909, relating to policy or contract of insurance of date September 16, 1909.

In the absence of the production of the originals, the defendants will offer secondary evidence thereof.

TREZEVANT, BARTELS & TREZEVANT,
Attorneys for Lumber Underwriters.

In the Circuit Court of the United States, Western Division of the
Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Filed June 12, 1911. Dan. F. Elliotte, Clerk.

Notice of Attorney for Plaintiff to Attorney for Defendant.

To the Defendant:

Please take notice that at the trial of the above styled cause you are requested to furnish the original of the following letters:

Letter dated June 16th, 1909, from L. H. Gage Lumber Co., to D. A. Fisher, Agent.

Letter dated July 29th, 1909, from L. H. Gage Lumber Co., to D. A. Fisher, Agent.

On failure to produce the originals the plaintiffs will offer secondary evidence of the contents of the letters.

This June 12, 1911.

CARUTHERS EWING,
Attorney for Plaintiffs.

Service of above notice is accepted.

R. L. BARTELS,
Attorney for Defendant.

UNITED STATES of AMERICA,
*Western Division of the
Western District of Tennessee:*

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof..

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 13th day of June, A. D. 1911, in the Following Cause, to-wit:

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Filed June 13, 1911. Dan. F. Elliotte, Clerk.

Order Granting Non-suit as to \$2,000.00 Policy.

This day came the defendant by its attorneys and the Plaintiff
55 with their attorney, when by leave of Court had and obtained
enters a non-suit herein on Insurance Policy No. 27979, being a renewal of policy No. 21,657 issued by the defendant

herein. Thereupon came a jury of good and lawful men, to-wit: J. A. Johnston, H. H. Maury, J. D. Huffman, W. J. Buridson, D. P. Sellers, H. O. Roberts, Jno. Dirnon, W. A. McLaughlin, C. J. Massey, Phil Werrum, C. W. Patton and H. M. Johnson, who being duly elected, empaneled, tried and sworn to well and truly try the remaining issue herein joined and a true verdict rendered according to the law and the evidence, when the trial of this case was begun but there not being sufficient time to complete the same today its further consideration is hereby postponed until tomorrow.

Ordered, that Court stand adjourned until tomorrow.

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof, Begun and Held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on To wit: the 14th Day of June, A. D. 1911, in the Following Cause, To wit:

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Came again the parties to this suit by their respective Attorney and also the jury of good and lawful men, heretofore empaneled, tried and sworn herein, when the trial of this suit was resumed, and the jury having heard the evidence and received the charge of the Court, upon their oaths do say they find the issue herein joined on Insurance Policy No. 27868 to be in favor of the defendant and against the plaintiffs. It is therefore considered by the Court that the Defendant Lumber Underwriters do have and recover of and from the Plaintiffs O. C. Rife and F. A. Stutzman, all costs herein accrued for the collection of which execution is hereby awarded.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Filed June 19, 1911. Dan. F. Elliotte, Clerk.

56

Motion for New Trial.

Comes now the plaintiffs and conforming to the rules of the Court moves for a new trial and for a judgment on the record, assigning the following reasons therefor:

1.

It was error in the Court to peremptorily instruct the jury to find in favor of the defendants. On the undisputed evidence the plaintiffs were entitled to a judgment on the policy sued on.

2.

The Court erred in sustaining the objection of the defendant to evidence offered by the plaintiffs in the examination of the witness O. C. Rife, as follows:

(a) Plaintiffs offered to prove by said witness that when application was made for policies on the property sued on prior in point of time to the policy made the basis of this suit and which was one of renewal of earlier policies, that the said Rife explained to D. A. Fisher the exact condition of the lumber, mill and topography.

(b) The Court erred in declining to permit the plaintiff to prove by the witness Rife that the plat and plan of the mill site and property thereon which was prepared before the policy sued on was issued was sent by the witness to L. H. Gage & Co. (on the understanding that it would be delivered to the defendant company) for the purpose of placing the company in possession of full knowledge of condition existing and with reference to the manner and method of piling lumber on the mill yard.

(c) The Court erred in declining to permit the witness Rife, one of the plaintiffs, to testify that the policy sued on was delivered to him and that he did not read it. And it was error in the Court to refuse to permit the witness Rife to testify that he relied upon the insurance policy complying with the terms of the contract he had made with D. A. Fisher, Agent of the defendant.

(d) The Court erred in refusing to permit the witness Stutzman, one of the plaintiffs, to testify that in 1909, before the issuance of the policy sued on and while the policy of which this is a renewal was in existence, an inspector of the defendant, the Lumber Underwriters, came to the mill of the plaintiffs and made a plan and plat thereof and made measurements and observations whereby the defendant was informed of the conditions which existed at that time and which continued to exist up to the time of the fire. In this connection, the Court erred in refusing to permit the plaintiffs to prove by the witness Stutzman that the defendant company, with

57 knowledge of every fact and circumstance and condition existing at the time of the fire, received a premium on the policy in existence at the time this knowledge was acquired and with this knowledge issued the policy sued on and retained the premium thereon and that the defendant company thus being made acquainted with all the facts and circumstances permitted the policies to remain in force and made no objection whatever thereto.

(e) The Court erred in refusing to permit the plaintiffs to prove by the witness Blair that Mr. Fisher, the agent of the defendant, requested that he be furnished with a plan and plat of the mill and lumber as to which insurance was sought and that the witness pro-

cured such a plan and plat from the plaintiffs and furnished it to D. A. Fisher, agent of the defendant.

(f) The Court erred in refusing to permit the plaintiffs to prove by the witness Blair that prior to the issuance of the policies of insurance on lumber the exact conditions were explained to D. A. Fisher, the agent of the defendant, with especial reference to the location of the barn and that with this knowledge and after this explanation the policies were issued.

(g) The Court erred in declining to permit plaintiffs to prove by the Witness Blair that an exception of a barn, oil house or elevator driveway from the clear space clause are made by insurance companies on request and without any change of rate or expense and that the existence of obstructions on the plaintiffs' mill yard were not matters that increased the rate of premium and that on notice or knowledge the insurance companies, and notably the defendant, were in the habit of excepting same from an alleged violation of a clear space clause.

(h) The Court erred in declining to permit the plaintiffs to prove that D. A. Fisher, the agent of the company, called to the attention of the witness Blair the fact that the defendant company had sent an inspector to the property insured and had examined it prior to or sometime in May or June, 1909, and that at the time of issuing the policy sued on the company had the report of this inspector and had knowledge of existing conditions.

The Court erred in declining to permit the plaintiffs to prove that prior to and at the time of the issuance of the policy sued on the defendant association had in its possession a plan and plat of plaintiffs' mill showing exactly how plaintiffs piled their lumber with respect to the mill and showing the existence of every building and structure, which are now claimed to have been violations of the clear space clause; that the defendant association with this
58 knowledge and information issued plaintiffs a policy of insurance and accepted and retained the premium thereon and that said policy of insurance contained the same provisions as the policy sued on; that with all this knowledge and information the defendant association issued the policy sued on and accepted and retained the premium; that at no time and in no way were plaintiffs informed that defendant construed the structures to be a violation of the clear space clause of the policy, nor were plaintiffs given any notice nor did they have knowledge that the defendant association objected to the condition as they existed, nor were plaintiffs given any notice or knowledge that the defendant association claimed that the policy had not been and was not continuing to be in force and effective.

Plaintiffs say that it was error in the Court not to permit the plaintiffs to show all of the facts and circumstances attending the issuance of the policy to the end that the jury might determine whether the defendant by its conduct lulled the plaintiffs into the belief that plaintiffs were not, as the parties construed the contract, violating the clear space clause, to the end that the jury might determine from all the proof whether the defendant association had

estopped itself to set up, after the loss, a claim that the policies had never been effective or had been forfeited.

Wherefore, the plaintiffs say that on the undisputed evidence they were entitled to a judgment and that the Court erred in giving a peremptory instruction in favor of defendant and erred in excluding evidence as set out above.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof, Begun and Held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on To wit: the 23rd Day of June, A. D. 1911, in the Following Cause, To wit:

No. 4043.

O. C. RIFE & F. A. STUTZMAN
VS.
LUMBER UNDERWRITERS, etc.

59

Law D'k't No. 4, Page 284.

Order Overruling Plaintiffs' Motion for New Trial.

This day came the plaintiffs by their attorneys of record herein and presents to the Court their Motion for a New Trial, which motion, upon consideration was, by the Court overruled and a new trial of this case refused and denied, and ordered accordingly.

Enter:

McCALL, Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings Had in said Court at a Regular Term Thereof, Begun and Held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on To wit: the 4th Day of July, A. D. 1911, in the Following Cause, To wit:

No. 4043.

P. C. RIFE & F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS, etc.

Law D'k't No. 4, Page 284.

Order Making Bill of Exceptions a Part of the Record, Bill, Etc.

This day came the plaintiffs by their attorneys and presents to the Court their Bill of Exceptions in this suit and moves for leave to file same as a part of the record in this case, which motion, upon consideration, is granted and allowed;

It is therefore Ordered by the Court that said Bill of Exceptions be filed in this case and made a part of the record herein.

Enter:

McCALL, Judge.

Circuit Court of the United States, Western District of Tennessee.

No. 4043.

RIFE & STUTZMAN

VS.

NEW YORK LUMBER UNDERWRITERS.

Plaintiffs' Bill of Exceptions.

Filed July 4th, 1911. Dan. F. Elliotte, Clerk.

Be it remembered this case came on to be heard on June 13th, 1911, in the Circuit and District Court- of the United States
 60 for the Western Division of the Western District of Tennessee, Judge John A. McCall presiding, the plaintiff- being represented by Messrs. Marsilliott and Chandler and Caruthers Ewing, and the defendant by Mr. R. L. Bartels, and after a jury had been selected, empaneled and sworn and the issues stated by respective counsel, the plaintiff- introduced the following evidence:

R. K. HOWARD, a witness for the plaintiff-, being first duly sworn, testified as follows:

Direct examination by Mr. EWING:

- Q. What is your name?
A. R. K. Howard.
Q. What is your business?
A. Farming.
Q. You are a farmer; where do you live?
A. Shaw, Miss.
Q. How close were and where were you on the day of the fire at Rife & Stutzman's mill?
A. On the day of the fire, when the fire broke out, I was about a mile and a half away on Deer Place Plantation.
Q. That was on Sept. 17th, 1909?
A. It was.
Q. You were about a mile and a half from the Mill at Tribbett, Miss.?
A. Yes, sir.
Q. Did you go over to the fire?
A. Yes, sir.
Q. About what time of the day was it when you saw the smoke first?
A. It was near two o'clock, I couldn't say exactly the time.
Q. How did you get over there?
A. Horseback.
Q. Did you ride fast or slow?
A. Fast.
Q. Were you the first person to get there, or among the first?
A. I was, I didn't see any one when I passed through the yard.
Q. Now tell the jury where the fire originated?
A. The fire originated in the mill.
Q. Originated in the mill?
A. Yes, sir.
Q. What kind of a day was this as to being cold or hot or wet or dry?
A. It was a very hot day and a very dry spell of weather.
61 Q. Mr. Howard, there — the mill and you say the fire originated there. What was the condition with reference to carrying away cinders and shingles and large pieces of fire?
A. Why the wind rose rapidly after the fire started, or when the fire started and it was——
Mr. BARTELS: Speak a little louder, please sir; I can't hear a word you say.
A. The wind rose as the flames started, so that cinders and boards and things of the kind that were on fire were carried a long ways through the field. Even a negro's house about five hundred yards away, belonging to Mr. See, the man I was working for, was set on fire.
Q. By this blowing cinders?
A. Yes, sir.

- Q. In which direction was the wind blowing?
A. It was from the north, blowing south.
Q. Did you notice the lumber burn and see where it caught fire?
A. Yes, sir.
Q. How far away from the mill was it that the lumber caught fire?
A. I don't know exactly the distance; it might have been 100 or 125 feet.
Q. Was there a barn there?
A. Yes.
Q. Did the lumber or barn catch fire first?
A. The lumber caught first.
Q. Was there an oil house there?
A. Yes, sir.
Q. That low small building?
A. Yes, sir.
Q. Did the lumber or the oil house catch fire first?
A. The lumber caught first.
Q. Did the lumber immediately south of the mill catch fire first?
A. It did.
Q. What was the distance between the lumber pile and the mill?
A. I suppose 100 feet. I never measured it.
Q. You never measured it?
A. No, sir.
Q. Was there a road between the pile of lumber and the barn?
A. Yes, sir.
Q. Did you undertake to tear away this lumber so as to interrupt the passage of the flames?
A. Yes, sir; I did.
Q. Were you successful in that?
A. I was not.
Q. This wind carried the flames very rapidly?
A. Yes, sir.
Q. Was the lumber on the yards destroyed?
A. It was.

Cross-examination by Mr. BARTELS:

- Q. How long had the fire been burning when you arrived there?
A. I suppose 10 or 15 minutes.
Q. What part of the property on the yard was on fire when you arrived?
A. The mill.
Q. In what direction from the mill was the lumber?
A. It was south or southwest.
Q. Did you make any measurements to ascertain the exact distance between the mill and the lumber that was burned?
A. I did not.
Q. In what direction from the mill was the barn?
A. It was southwest.
Q. In what direction from the mill was the oil house?

A. It was southeast.

Q. Was there a lumber platform immediately north of the barn?

A. There was, I think.

Q. Do you know the width and length of that lumber platform?

A. Do not.

Q. Do you know the width and length of the barn?

A. I do not.

Q. Both the lumber platform and the barn intervened between the mill and the lumber that was burned, did it not?

A. I didn't understand that question.

Q. The lumber platform and the barn intervened between the mill and the lumber that was burned, did it not?

A. Part of the lumber that was burned, it did.

Q. The lumber that was burned, as I understood you to say, was southwest of the mill?

A. It was south and southwest.

Q. South and southwest?

A. And some southeast.

Q. Were you there at the time that the lumber caught on fire?

63 A. I was.

Q. Do you know whether or not this lumber platform caught on fire before the lumber caught on fire?

A. Which lumber platform do you have reference to?

Q. The one immediately north of the barn?

A. No, it did not.

Q. Did you see that lumber platform burn?

A. I saw the barn burn and it was attached to the barn and I must have seen the lumber platform burn.

Q. What set fire to the barn and the lumber platform?

A. The stacks of lumber.

Q. The fire originated in the mill?

A. Originated in the mill, yes, sir.

Q. And then spread to what?

A. Due south to the lumber stack.

Q. And then from that to what did it spread?

A. Over the entire yard.

(Here Court adjourned till June 14th, 1911, 9:30 A. M., at which time the plaintiff introduced the following evidence in naddition to the preceding witness.)

O. C. RIFE, a witness for the plaintiff- being first duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Your name is O. C. Rife?

A. Yes, sir.

Q. Are you a member of the firm of Rife & Stutzman?

A. I am.

Q. Rife and Stutzman were the partnership that ran this mill at Tribbett?

A. Yes, sir.

Q. Was there any other lumber mill in that territory?

A. No, sir; not in the city, not in the town.

Q. Under what circumstances and when did you first apply for insurance to D. A. Fisher?

A. You mean on the first——

Q. The first policy that was issued on your lumber on this yard?

A. The \$2,000.00 policy?

Mr. BARTELLS: I object to that. The point at issue is whether or not there was a maintenance of a clear space of 100 feet maintained subsequent to the issuance of the contract of insurance in question, to-wit, May 22, 1909. The fact that he may have obtained previous contracts of insurance from Mr. Fisher, either as an individual agent or as the agent of the Lumber Underwriters, the defendant in this suit, cannot affect the rights of the parties under the particular contract in question.

After argument the objection was sustained, to which action of the Court the plaintiff- excepted, and Mr. Ewing, counsel for plaintiff-, was permitted by the court to state, for incorporation in the record the following: that the witness if permitted to answer would say that he explained the conditions to Mr. D. A. Fisher, the agent, and told him he would pile his lumber 100 feet from the mill and nothing further was said and this took place before any policy was issued, and that policy No. 27566 was issued, which expired and the policy here sued on was issued as a renewal.

Q. I will ask you Mr. Rife, whether, after the first insurance was taken on this policy, you prepared a plat which showed the mill, barn, the oil house, the roadways and the lumber on the yards, and with all measurements appearing on that plat?

A. I did, except as to the roadway; I didn't put the roadways down, I don't think.

Q. What did you do with that plat?

Mr. BARTELLS: I object to the question on the ground that the evident purpose of the question is to show that the plat was furnished, either to the agent of the Lumber Underwriters, or to the Lumber Underwriters themselves, and that this being a suit upon a written contract no evidence which occurred prior to the issuance of the contract itself can be considered which will contradict or vary the terms of the written contract.

The COURT: Might not this be competent to show just what the situation was there outside of the question of the 100 foot space?

Mr. EWING: I am not asking it for that purpose. Mr. Bartells correctly states the purpose as to giving it to the Insurance Co. or the Agent. I will later show the conditions by the witness, but the purpose of the question — to show that he prepared a plan and a plat and the witness, if permitted to answer, would so state, and that he delivered it to the agent of the company.

After further argument the Court said:

The COURT: Well I think this may be offered as evidence tending to show the condition of the property at the issuance and subse-

quent to the issuance of the policy, to show the physical condition there.

Mr. BARTELLS: Without in any wise affecting the rights of the parties under the contract.

The COURT: Yes.

65 Mr. BARTELLS: That's all right.

The COURT: Without being considered for the purpose of changing or altering the written contract between the parties, sued on here.

Mr. EWING: Well I don't want, of course, to violate the ruling of the court, but the purpose of introducing this proof would inpinge upon the ruling of the Court at this particular time, so I will proceed to this other plat. I am not inquiring about this delivery of the plan and plat of the property for the purpose of showing its physical condition, because I haven't got that particular plan; I am offering it solely as evidence to show the knowledge before the issuance and after the issuance of the policy, that there were two plats furnished.

Mr. BARTELLS: What does your Honor rule on that?

The COURT: I exclude it so far as it tends to alter or change the written contract between the parties.

Mr. EWING: I understand with that restriction on the proof, I may prove the fact. I except to this limitation or restriction.

The COURT: Yes.

Q. What did you do with this plat?

A. I sent it to the L. H. Gage Lumber Co.

Mr. BARTELLS: I object to that; that's wholly immaterial. The fact that it was given to the H. L. Gage Lumber Co. has nothing whatever to do with this law suit; they are not parties to this law suit.

Mr. EWING: If I don't prove that they delivered this particular plat to Mr. Fisher, all of it is incompetent and goes out.

The COURT: Certainly it would be wholly immaterial to show that he delivered it to Mr. Gage or anybody else, unless properly connected, with a view that he will connect it, Mr. Ewing may show it; otherwise I will withdraw it from the jury.

Mr. EWING: With our consent, if we don't show it.

The COURT: But let me state to the jury, I am permitting this proof to be made for the purpose only of showing the conditions at the place where the insured property was located and not for the purpose of altering the contracts or the understanding between the parties before the contract was made, but only to show the physical conditions there afterwards.

Q. Did the plat and plan convey, if delivered to the insurance company, exact and accurate knowledge of the conditions obtaining at the mill?

A. What was that last?

66 Q. Did this plan or plat, which you sent to the L. H. Gage Lumber Co., correctly and accurately portray the conditions existing at the mill?

Mr. BARTELLS: At what time?

Mr. EWING: At the time you sent the plat, prior to the issuance of the policy sued on and right after you had talked to Mr. Fisher?

A. Yes, sir.

Q. Please state whether this paper (referring to plat, Exhibit to Stutzman's testimony) which I now hand you, is a correct plan or plat of this property and whether the measurements on it are correct?

(Here follows diagram marked page 66½.)

67 A. I didn't make this plat, but as near as I can——

Mr. BARTELLS: I object to that.

The COURT: Yes.

Q. You say you never made the plat?

A. I never made this plat.

Q. To the north of the mill there was no lumber piled, was there?

A. Not directly north, no, sir.

Q. The lumber was piled to the south of the mill?

A. Piled to the east——

Q. This is south?

A. That's south: this is east. It was piled to the south (indicating on the plat).

The COURT: Southeast and southwest?

A. Yes, sir.

Q. Did you ever measure from the end of your mill due south to the nearest pile of lumber?

A. I did.

Q. How far was that?

A. It measured 110 feet.

Q. To the nearest lumber to the mill?

A. Nearest to the mill.

Q. At what point did you commence at the mill?

A. I commenced at the shed.

Q. Now did you measure from the mill to the lumber to the southwest?

A. I did.

Q. What was between the mill and the lumber in a southwesterly direction?

A. There was a stable in there.

Q. Was that stable a mill working arrangement, or what was it?

A. It was a stable for stabling our mules, the mules we had for hauling lumber.

Q. How far was that stable from the mill?

A. I don't recollect: I put the dimensions on the plat, but I don't recollect that.

Q. Was that shown on the plat you sent up?

A. Yes, sir.

Q. Do you know how far it was from the barn to the lumber?

A. No, sir; I do not.

Q. Now on the southeast and between the mill and the lumber I notice a little oil house?

A. Yes, sir.

Q. What was that?

A. Oil house.

68 Q. What did you keep in there?

A. Oil.

Q. Lubricating oil?

A. Yes, sir.

Q. What size was that house and how high was it?

A. It wasn't over 16 feet square.

Q. How high?

A. Well probably 7 or 8 feet high.

Q. Do you know how far that was from the mill?

A. No, sir; I do not.

Q. What was the closest point between the mill and the lumber? Was it south, or was it southeast and southwest?

A. Directly south.

Q. That was the closest point?

A. Closest point; yes, sir.

Q. And that exceeded 100 feet?

A. Yes, sir.

Q. But it was not 100 feet, as I understand it from the mill to the oil house?

Q. What sized lumber was it you used in this drive way?

A. Well it was 2 inch lumber for a flooring.

Q. Was it elevated?

A. Elevated; I don't know exactly how high, probably as high as that table there, a little bit higher, may be.

Q. How were the ends of this platform?

A. Roadway right up on to it at both ends.

Q. You mean to say there was a slant at each end so that you could drive a wagon up on one end and down on the other; is that what you mean?

A. Yes, sir.

Q. What was the purpose of this elevated driveway? What did you drive up on there for?

A. To load lumber in the car.

Q. You put lumber on a wagon and then drive up on this drive way and put it—

A. Into the car.

Q. — into the car?

A. Yes, sir.

Q. That was within 100 feet of the mill also, wasn't it?

A. Yes, sir; I think so.

Q. Were you present at the time of the fire?

A. I was there before the fire and after the fire, but it was all burned down when I got there.

69 Q. What was the value of the lumber belonging to Rife & Stutzman that was destroyed on that yard?

A. Well, I can't say.

Q. Well about, the nearest you can give us?

A. Well, somewhere between \$10,000.00 and \$12,000.00.

Q. That was the lumber your firm owned there?

A. Yes, sir.

Q. What insurance did you have except this \$5,000.00 policy?

A. We had \$2,000.00.

Q. In the same company?

A. Yes, sir.

Q. Were you there when the adjuster came?

A. Yes, sir.

Q. When the fire took place, to whom did you give notice, if any one?

A. To Mr. Fisher.

Q. The agent of the defendant?

A. Yes, sir.

Q. Did the Company send an adjuster down?

A. No, sir.

Q. Nor was it 100 feet from the mill to the barn?

A. No, sir.

Q. Something was said yesterday about what Mr. Bartells called a platform; what was that structure, if such it may be called?

A. Well, it was a roadway that we had for driving up on one end and off on the other, loaded lumber, loading lumber to put in cars.

Q. The railroad had a switch there?

A. Yes, sir.

Q. And that switch track run out on to your yard or near your yard?

A. It didn't run into the lumber; it run past the lumber there was some lumber piled there.

A. Not right away; I suppose in a week or so, maybe longer.

Q. Did he make any investigation or examination there?

A. Yes, sir.

The Court:

Q. Where is that drive way you were talking about here?

Mr. EWING: It don't appear on there.

Q. Why did you not put the elevated drive way on this plat?

70 A. Well I was not asked to do that. I was asked to make a plat of the distance from the mill to the houses and from the houses to the lumber.

Q. When did you first hear of any question being made about that elevated drive way?

A. About 45 or 50 days after the fire.

(It is agreed that on November 1st, 1909, the defendant denied liability on the ground of a violation of the clear space clause, by a letter marked "Exhibit No. 1" to the testimony of Mr. Rife.)

EXHIBIT No. 1.

(Letter Head.)

WILLIAM A. STONE, Adjuster. Tenn. Trust Building, Memphis,
Tenn.

MEMPHIS, TENN., Nov. 1st, 1909.

Messrs. Rife & Stutzman, Tribbett, Miss.

GENTLEMEN: Referring to your alleged claim for loss upon lumber destroyed by fire on the 17th of September, 1909, against the Lumber Underwriters, whose policies Nos. 27868 and 27979 you hold, I beg to call your attention to the Clear Space Clause attached to same, and made part of the contract. These clauses you have violated and under the circumstances, the Company feels it has no liability, and respectfully declines to consider and claim against it.

Very truly yours,

WM. A. STONE, *Adjuster.*

Q. Could you tell whether or when, from looking this over, or was any charred stumps or any part of this barn saved, or was it all burned?

A. It was all burned; everything was burned.

Q. Was the mill burned too?

A. Yes, sir.

Q. Did you have any insurance on the mill?

A. No, sir.

Q. Was the platform burned?

A. Yes, sir.

Q. Had that elevated roadway that you used as a means of loading into your cars been there all the time of the existence of policies of insurance?

A. Yes, sir, before.

The COURT: Where does he say it was located? Between the barn and this railroad?

71 Mr. BARTELLS: The barn and the mill.

Q. Where was this driveway or platform on which you drove your wagon; where was that with reference to the barn and the mill? Was it between the barn and the mill, or southwest of the barn?

A. The platform was between the switch or railroad and the barn.

The COURT: Is that a switch that runs around there, or the main line?

Mr. BARTELLS: That's a switch.

The COURT: Are there two switches coming in there?

Q. How many railroad switches are there there?

A. Only the one.

Q. Look at this and state what this short line is here?

A. That is the switch that comes in from the logging; we haul our logs in by tramroad.

Q. That is the mill comp-n-'s switch?

A. Yes, sir.

Q. And this long thing, what is that?

A. That's the railroad switch.

Q. Did you keep any buckets or barrels of water with buckets out there?

A. There was buckets and barrels when the fire occurred. I was notified—I don't know probably four or five months before.

Q. Before the fire?

A. Before the fire, to put buckets out there and I done so.

Cross-examination by Mr. BARTELS:

Q. Your mill was situated north to northeast of your lumber, was it not?

A. Directly north.

Q. Well was it not northeast of the lumber situated to the southwest of the mill?

A. Yes, sir.

Q. Now southwest of your mill was located your barn, was it not?

A. No, sir.

Q. Well in what—

A. Yes, sir, you are right.

Q. Now what was the size of that barn?

A. I can't give you the dimensions of it.

Q. Immediately north, between the barn and the switch lay your driveway or platform, did it not?

A. Immediately north of the—

Q. —barn?

A. Yes, sir, between the barn and the switch.

72 Q. What was the distance from the mill to the platform, as you call it?

A. I can't give you the distance.

Q. What was the distance from the mill to the barn?

A. How is that.

Q. Do you know the distance from the mill to the barn?

A. No, sir; I didn't make this plat.

Q. You don't know the dimensions or size of the barn or of the platform?

A. No, sir; not the exact dimensions of it.

Q. Do you know the distance from the barn to the lumber at its nearest point?

A. No, sir.

Q. Who made this plat?

A. Mr. Stutzman made it.

Q. When was it made?

A. I don't know.

Q. Do you know Mr. E. M. Lindsey of Memphis?

A. That's the adjuster, he was down there, first time I ever met the gentleman.

Q. You had a conversation with Mr. Lindsey, did you not?

A. Yes, sir.

Q. Didn't you accompany Mr. Lindsey at the time he investigated this loss?

A. I went up and helped him make the measurements.

Q. You held the tape for Mr. Lindsey?

A. Yes, sir.

Q. Did not Mr. Lindsey state to you at the time that the clear space clause had been violated by the lumber platform and the barn intervening between the lumber and the mill?

A. Not to my recollection.

Q. Have you any recollection on that?

A. No, sir.

Q. You did hold the tape for Mr. Lindsey?

A. Yes, sir.

Q. Did you ask the result of his measurements?

A. I think I did, I know I did; the measurements from the mill to the lumber, directly south.

Q. What did he tell you as to that?

A. 143 feet.

Q. Did you ask him anything relative to the distance between the mill or the lumber platform or the driveway?

A. I don't remember.

73 Q. Or anything as to the distance between the barn and the lumber to the south or southwest?

A. There was something said about it, but I don't recollect.

Q. Do you recall what Mr. Lindsay told you relative to those measurements?

A. Yes, sir; I think he told me it was 88 feet from the mill to the barn or platform; I know there was something about 88 feet.

Q. 88 feet from the mill to the barn?

A. Yes, sir.

Q. Of what did this lumber platform consist, of what character of material?

A. Two inch oak lumber was the flooring, and then it was built up on—

Q. Stilts, logs or posts?

A. No, sir; blocks, I'll say blocks from trees 18 or 20 inches in diameter. It was supported by wooden blocks.

Q. Supported by wooden blocks?

A. Yes, sir.

Q. And it was of wood?

A. Oak wood.

Q. What character or material did you use on your barn?

A. Well that was oak and gum.

Q. It was lumber?

A. Yes, sir.

Q. Was there a stable in there in addition to the barn, or was the barn and stable one and the same?

A All the same.

The COURT: What was it used for? Ask him that.

Q. What was your barn used for?

A. Putting mules in it.

Q. Keeping your stock?

A. Keeping the mules.

Q. I am handing you a paper which I am going to mark with blue pencil for the purpose of identification "E. M. L." and I will ask you to look at this paper and state whether it correctly represents the condition of your mill and lumber yard at or about the time of the fire, except with reference to the distance, as to which you have testified you have no knowledge? Look at the paper. At the request of your counsel I will explain this paper, that is to say with reference to the directions and the character of the buildings or other obstacles on the yard. There is your mill marked "saw mill."

74 This is north. Here is the lumber up here to the west of the mill, and here is the railroad track running in here. Here is what purports to be the lumber platform or drive way lying immediately between the barn and the switch, and here is the barn a little to the south of the lumber platform.

A. The platform I think came even with the barn.

Q. Well, that's about even. The lumber is down here south to southwest in accordance with the plat that you have here. The only difference, as I see it, between this plat and that plat is that it shows the lumber platform and the distances but you have testified that you know nothing about the distances and I am simply offering this to you for the purpose of identifying it with reference to the location of the lumber platform and the barn as it appeared upon your yard at the time of the fire. Does that correctly represent the location of the lumber platform and the barn?

A. Only the platform and the barn. I think the platform run a little bit further.

Q. To the east of the barn?

A. Yes, sir.

Q. But the location is approximately correct?

A. Approximately, yes.

Q. The only difference being that the lumber platform projected a little to the east of the barn?

A. Yes, sir.

(Here follows diagram marked page 74½.)

Nov

Dry

Lumber on this space

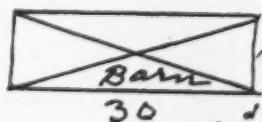
Drive way

Black
Smith
Shop

Lumber here.
(Gum & Cypress)
saved for

Rife &

80
Lumber
Platform



Lumber Burned

E.M.L.

80 ft.

San V. R. R.



North.

No. 279.
Lumber Distribution
Rife & Co. } p. 74 1/2

Lumber on this space
we way

Black
Smith
Shop

45 ft.

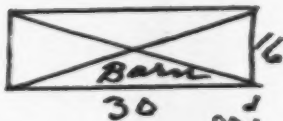
20.
Saw Mill
Ban Mill, capacity
about 20,000

Boiler
Room

Lumber here.
(Gum & Cypress)
saved property. 12 1/2 ft.

Rife & Stutzman Ry

80
Lumber
Platform 15



Lumber Burned.

(E.M.L.)

"South"

"East"

130 ft.

75 Redirect examination by Mr. EWING:

Q. Did you read this policy after it was delivered to you?

Mr. BARTELLS: I object to that question as wholly immaterial.

The COURT: You can ask him if he can read.

Mr. EWING: Well I agree that he can read.

Objection sustained.

Plaintiff- excepts.

(The witness, if permitted to answer the question, would say that he never read it.)

Q. Did you rely upon its complying with the oral statement you had made to the Agent Fisher?

Mr. BARTELLS: I object to that. The contract speaks for itself.

Objection sustained, plaintiff- excepts.

(The witness if permitted to answer, would say yes.)

The COURT: I understand that the witness can see and can read.

Mr. EWING: Yes, sir. The Supreme Court said it wasn't necessary to read the policy; that he had a right to rely and presume—

The COURT: Go ahead.

Q. This plat which Mr. Bartells has handed to you, you know nothing of any distances upon it, but I will get you to look at these distances, to look at the location, for instance I see he's got the word "lumber" on this plat written right back of a blacksmith shop. What about that?

A. There was some lumber there, but it didn't burn.

Q. Didn't burn?

A. No, sir.

Q. And on this plat is marked where the lumber burned, which would indicate that it was to the south and southwest of the mill. That is where the lumber burned, is it?

A. Yes, sir; south and southwest and southeast.

F. A. STUTZMAN, a witness for the plaintiff-, being duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name.

A. F. A. Stutzman.

Q. You are a member of the firm of Rife & Stutzman?

A. I was.

Q. A member of the partnership that owned this lumber that burned at Tribbett, Miss., at the mill there?

A. Yes, sir.

76 Q. Where did you live?

A. I was living at Tribbett at that time.

Q. Was there any other mill in that territory, or near there except this mill?

A. Not closer than about three miles.

Q. What was the name of the other mill?

A. There was a small mill out there, not however in operation at the time of the fire, that had belonged to a man by the name of Ripsy, that was out in the woods.

Q. Is Tribbett a large and populous place, or is it a small sized affair?

A. It is a very small place.

Q. Did you have any conversation at any time with Mr. Fisher about any of this insurance?

A. I was up to——

Q. Just state first whether you did or did not. Did you?

A. Yes, sir.

Q. Was that before or after this particular policy was issued, this \$5,000.00 policy which was issued on May 22nd, 1909?

A. That was after that.

Q. After that?

A. Yes, sir.

Q. Where did you talk to him?

A. I talked to him at his office.

Q. On what subject, what about?

A. In regard to two insurance policies.

Mr. BARTELS: Before or after the fire?

Mr. EWING: Before the fire?

A. In regard to the two insurance — was after the fire and regarding one insurance policy was before the fire.

Q. Well about this policy in particular, did anything pass about this \$5,000.00 policy before the fire between you and Mr. Fisher?

A. In regard to that, I could not be positive.

Q. Mr. Stutzman, did you draw that plat?

A. Yes, sir.

Q. When did you draw that?

A. I drew this immediately——

The COURT: What plat? There have been two introduced.

Mr. EWING: I am talking about the one I introduced. This other is Mr. Bartels'.

The COURT: I understand, but he has them both.

Mr. EWING: Well, I am referring to the good plat, the right plat.

77 A. This plat was drawn about two days after the fire.

Q. Does that plat correctly represent the measurements and conditions as they existed at the time of and before this fire?

A. Yes, sir; as nearly as I could possibly make them with a tape line.

Q. You used a tape line in running these points that you have got marked on there?

A. Yes, sir.

Q. What was the nearest point between a lumber pile and the mill, called the wood-working establishment?

A. Between the mill and the wood-working establishment?

Q. Yes, sir; what was the nearest point between the mill and the lumber piles on your yard?

A. The nearest point I think was 112 feet; I think it is marked on here.

Q. Where was that lumber, that 112 foot lumber pile?

A. Directly south of the mill.

Q. I see there 143; what does that represent?

A. That represents the distance from the mill proper to the nearest pile of lumber. There was a lumber shed directly south from the mill, from which I always took measurements. This was nothing but a roof and posts to support it, and the grading of the lumber was made under this particular roof.

Q. Now it was 112 feet from the end of that shed to your lumber pile?

A. Yes, sir; from the posts, outside posts.

Q. But from the mill to the lumber was 143 feet?

A. I believe so, yes, sir.

Q. Will you look at your plat and see, to refresh your memory, if these are the measurements made at the time?

A. This 143 feet is from the mill here to the closest lumber, and from the south eave of the shed to the lumber is 112 feet.

Q. What was between the mill and this lumber pile, to the south?

A. There was nothing between the grading shed and the lumber.

Q. Between the lumber piles and the mill, in other words, there was absolutely nothing to the south?

A. Nothing with the exception of the switch, which passed right by the—

Q. I understand. Now then, how far on the southwest was there anything from the mill, traveling southwest from the mill?

78 A. The closest thing southwest of the mill was this elevated drive way which we loaded lumber off of.

Q. How far was that from the mill.

Mr. BARTELS: It doesn't appear on that plat.

A. It doesn't appear on this. I can give you almost the exact distance, however, by giving the distance from the barn and knowing the distance here from the barn to the shed.

Q. All right, give it?

A. The closest point was about 40 feet.

The COURT: Forty feet from the mill to the elevated plankway?

A. To this platform or drive way; yes, sir.

Q. How far from the drive way to the barn?

A. The drive way was within 8 or 10 inches, very close.

Q. To the barn?

A. Yes, sir.

Q. How close? What was the distance, in a south-westerly direction from your mill to the lumber pile?

A. From the mill to the lumber pile?

Q. From the mill to the lumber pile?

A. About 156 feet.

Q. What was the distance between the mill and the lumber pile, traveling out in a fan shaped direction from the southeast?

A. From the southeast, I would judge it was—let's see, I haven't the measurements down here, but I'd judge it was at least 160 feet.

Q. What was between the mill and the lumber pile on the southeast?

A. A small oil house.

Q. What kind of oil did you keep in there?

A. We kept lubricating oil for the use of the mill.

Q. What was the height of that structure?

A. I am not positive, but I think it was a seven foot fall.

Q. Where were you on the day of the fire?

A. At the time—

The COURT: How far was it from this oil house to the lumber?

A. From the oil house to the lumber it was—well, directly south of the oil house I suppose—

The COURT: I mean the nearest point.

A. I suppose it was possibly 85 feet.

Q. From the nearest point to the oil house was about 85 feet?

A. Yes, sir.

79 Q. Where were you on the day of the fire?

A. At the time the fire originated I was about two and one-half or three miles from the mill in the woods.

Q. Did you get over there before all of the lumber was destroyed?

A. Yes, sir.

Q. The fire was in progress when you got there?

A. The fire was in progress when I got there.

Q. What was the condition of the fire with reference to whether the mill had been burned at the time you got there?

A. The top story of the mill had fallen in and the lower portion of the mill was two-thirds burned, I should judge.

Q. What was the condition of the flying embers?

A. Well, directly south, it was very hot through there; I couldn't say exactly in regard to flying embers for the simple reason that I was living on the place and wished to get to my residence.

Q. Where was your residence?

A. My residence was—

Q. South or north or in what direction?

A. It was almost due west of the mill; a little bit south.

Q. How far was your residence from the mill?

A. Oh, possibly 400 feet.

Q. Did it burn?

A. Yes, sir.

Q. Was the fire communicated to your residence from the mill, or from the lumber?

A. From the lumber.

Question and answer objected to by defendant as immaterial.

Objection sustained.

Plaintiff- excerpts.

Q. When you got there and found the mill burning had the lumber caught fire?

A. Yes, sir.

Q. Where had it caught fire?

A. Directly south of the mill.

Q. Had the barn burned?

Mr. BARTELS: I object to that; it is wholly immaterial. There's just one point in issue here, and that is whether or not there was a violation of the clear space warranty of 100 feet, and it becomes wholly immaterial whether the barn or the lumber burned first.

The COURT: Let him answer the question.

80 Mr. BARTELS: To the action of the court in permitting the witness to answer this question defendant excepts upon the ground that it is wholly immaterial as to the real issue in this case, whether the barn or lumber platform first burned, or whether the lumber insured first burned.

Q. Had the barn caught fire, or was it burning when you got there?

A. The barn had just caught when I got there.

Q. It had just caught?

A. Yes sir.

Q. Which was further along, the fire at the barn or the lumber?

A. The lumber, by far.

Mr. BARTELS:

Q. I note the same objection your Honor, and the exception.

Q. Had this elevated drive way or platform, your loading platform, was that burning when you got there?

A. As to that I could not be positive, but I would say not, for the simple reason that nothing but the roof of the barn was afire when I got there.

Mr. BARTELS: That's a pure matter of opinion though?

WITNESS: Yes, sir.

Mr. BARTELS: Well, I ask the Court to exclude that.

The COURT: Yes, don't state your opinion. Unless you have a definite recollection about it——

Q. The roof of the barn alone was burning?

A. Yes sir.

Q. And the lumber was very much afire down there?

A. Yes sir.

Q. Was your oil house burning then?

A. I could not state.

Q. To what extent had the fire progressed in the lumber?

A. It was burning in either the second or third row of stacks directly in front of the mill.

Q. Was there any fire, when you got there, in the first row of stacks?

A. In the first row of stacks directly south of the mill—that was practically destroyed.

Q. It had caught there and had gone into the backward stacks?

A. Yes sir.

Q. Were there any other houses or properties around there ignited by this fire from the mill?

Mr. BARTELS: I object to that; it is wholly immaterial.

81 Mr. EWING: I offer it purely as a circumstance for the jury to consider, to show that the mill caused this fire in the lumber yard and that the platform and the barn and oil house had nothing to do with the loss.

Mr. BARTELS: I renew my objection. It becomes wholly immaterial if there was a violation of the warranty.

The COURT: That's shown by the proof I permitted you to introduce a moment ago. I cannot see how the fact that some other house somewhere else would burn, could be material.

Mr. EWING: I want to show how this fire was transmitted, that's all.

Q. Now I will ask you whether in 1909, before the issuance of the present policy and while policy No. 27566 was in existence, an inspector for the Lumber Underwriters, the defendant, came to the mill and made any measurements and examination?

Mr. BARTELS: I object to the question.

Objection sustained.

Plaintiff- excepts.

Mr. EWING: The plaintiff- offers to show by this witness that the inspector of the defendant did come and did make measurements and observations and see and know the conditions there. I forgot to include in that question and I desire to do so—were the conditions at the fire substantially and practically the same as when this inspector came in 1909?

Mr. BARTELS: I object to that question.

Objection sustained.

Plaintiff- excepts.

Mr. EWING: I want to show that the conditions were about the same and continued the same, that there was no material change made and the witness, if permitted to answer, would state that the conditions remained the same.

Q. Did you know of any objection, after this inspector came and examined these premises and saw them and saw what was there and how it was situated, was any objection made to you as to any condition that was then existing in the mill?

Mr. BARTELS: I object to the question.

The COURT: That was before the issuance of the policy?

Mr. EWING: It was during the pendency of a previous policy.

Mr. BARTELS: With which we've got nothing to do.

The COURT: Before the issuance of the policy sued on?

82 Mr. EWING: It was during the existence of a policy issued before this policy and of which the one sued is a renewal.

Objection sustained.

Plaintiff- excepts.

Mr. EWING: The witness, if permitted to answer, would say that

he never heard any objection. I understand there's no question made about the value of the lumber, the refusal to pay being based on one ground only.

The COURT: The only defense is that you didn't maintain the required space.

Cross-examination by Mr. BARTELS:

Q. What occasioned you to make this plat?

A. I think two reasons; it was made as a copy—not as a copy but as evidence that might be required, and as we had no plat of this ourselves, and it was to the interest of our insurance as well as other things.

Q. How many days after the fire was it when this plat was made?

A. I should judge from one to two days. It was made immediately afterwards you might say.

Q. Had you any reason to believe at that time that your insurance would be questioned?

A. No, sir.

Q. Why did you leave off of this plat the shed which was attached to the mill immediately south of it?

A. The shed which was attached? Well I'll tell you why that was left off. This plat was made about the time I believe, or a day after the adjuster had been down there. He made his measurements from the mill; not from the shed, and I made mine likewise.

Q. What was the name of the adjuster?

A. As to that, I could not be positive.

Q. Was his name Lindsey?

A. I think it was.

Q. Did you accompany him when he made his measurements.

A. Not when he made all of his measurements. I accompanied him in making part of the measurements and in estimating this lumber up here.

Q. You were present then part of the time when Mr. Lindsey was making his investigation?

A. Yes, sir.

Q. Did Mr. Lindsey make known to you the result of his measurements?

A. I saw them.

83 Q. Why did you leave off of this plat the lumber platform, or what has been termed the lumber drive way?

A. For the simple reason that we understood that this was no extra risk; that like any drive way it was just considered a drive way. We were asked to make exceptions to the building. We did not consider the buildings.

Q. Don't state anything that occurred previous to the issuance of this contract. I want to know why you left off of this plat, which you say you made for the purpose of protecting your interest in your insurance contract, the lumber platform or drive way?

A. The only reason, I just stated, we did not consider it more than any other drive way.

Q. What was your object in making this plat? Was it not to show the physical condition of your lumber yard?

A. Yes, sir.

Q. And the lumber and various platforms or obstacles on the yard and the saw mill?

A. Yes, sir.

Q. Did you make these measurements at the time, or shortly before you drew the plat?

A. I made them the same day, yes, sir.

Q. Who accompanied you when you made your measurements?

A. Some negro, I could not state who; I picked up a negro.

Q. Were they made after Mr. Lindsey's visit or before?

A. I think they were made immediately afterwards; possibly the same day.

Q. Did Mr. Lindsey state to you at the time that he made his investigation, that the obstacles consisting of the lumber platform and the barn violated clear space of 100 feet?

A. I am not positive, but I think he mentioned the barn. If he had mentioned the platform I would most assuredly have put it in there, knowing about it.

Q. Did you undertake to confirm or disprove the measurements of Mr. Lindsey while Mr. Lindsey was on the ground?

A. No, sir; I assisted him in making them.

Q. Did you make any measurements from the mill to the lumber platform?

A. I could not be positive, I didn't there. I don't know whether he did or not.

Q. There is nothing on your plat here to show the lumber platform or to show any measurements from the mill to the lumber platform, and as I understand, your answer is that you have
84 no recollection as to whether you made such a measurement, is that correct?

A. I don't think such a measurement was made.

Q. Did you make a measurement from the barn to the lumber at its nearest point?

A. Yes, sir.

Q. What was that distance?

A. 48 feet.

Q. In what direction did your measurements go?

A. It was a little bit southwest of the southwest corner of the barn.

Q. In other words, from the southwest corner of the barn to the nearest point of the lumber was approximately 48 feet?

A. Yes, sir.

Q. What was the size of that barn?

A. 16 by 30 or 32.

Q. 16 feet wide by 30 feet long; is that correct?

A. Yes, sir.

Q. What was the distance between the barn and the lumber platform on the north?

A. Very little, I should judge 8 or 10 inches.

Q. Approximately a foot then?

A. Approximately a foot.

Q. What was the size of the drive way of the lumber platform, do you know that?

A. It was possibly 60 feet long.

Q. How wide?

A. And about 16 feet wide.

Q. What was the height of your platform or drive way approximately four feet?

A. No, sir; approximately three feet, not over, I don't think.

Q. And you don't know the distance from the mill to the lumber platform?

A. No, sir.

Q. But as I understood you, the distance from the mill to the barn was 60 feet or approximately so. I think it shows 60 feet on your map. Look at that.

The COURT: From the mill to the barn?

A. From the nearest point of the shed to the barn was 60 feet.

The COURT: Now, Mr. Bartells, you needn't go over these distances again, if you've got them all.

Mr. BARTELLS: I've got them all I believe.

Q. Did you question Mr. Lindsey's distances, or measurements at the time he made them known to you?

85 A. No, sir.

Redirect examination by Mr. EWING:

Q. You were asked why you didn't put this drive way or loading platform on the plat you drew. When did you first learn that there was any point or question made about that?

A. Yesterday.

Q. You didn't know anything about that being claimed until yesterday?

A. No, sir.

Q. You merely put on there the structures and the buildings?

A. Merely put on there the structures and buildings.

Mr. JAMES R. BLAIR, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name to the Court and Jury?

A. James R. Blair.

Q. Are you connected with the L. H. Gage Lumber Co.?

A. Yes.

Q. Were you ever in the insurance business?

A. No, sir.

Q. What experience have you had in insuring lumber and—

Mr. BARTELLS: I object to that; it's wholly immaterial.

The COURT: I can't tell yet; Mr. Ewing is sort of feeling the witness, I suppose.

Mr. EWING: I have a definite purpose which I can state very quickly.

Mr. BARTELS: I object to the question and ask the ruling of the Court.

Objection overruled.

Mr. BARTELS: To the action of the Court the defendant excepts on the ground that the question is wholly irrelevant and immaterial to the *issued* in the case.

The COURT: So is asking a man how old he is.

Q. What experience have you had in the matter of insuring lumber and obtaining of insurance policies in Memphis?

A. For about six years I have been manager of the Crittenden Lumber Co. and placed all of their insurance.

Q. Has that brought you in touch with the insurance business on lumber here?

A. Yes, sir.

86 Q. The L. H. Gage Lumber Co., did it have any lumber of the yards of Rife & Stutzman in March, 1909, or shortly after March, 1909?

A. Yes.

Q. Did you insure, through Mr. D. A. Fisher, Agent, the lumber of L. H. Gage & Co. piled on the yard?

A. I did.

Defendant objects.

Objection overruled.

Mr. BARTELS: To the action of the court in permitting the witness to answer the question, defendant excepts on the ground that it is wholly immaterial and irrelevant to the issues in this case.

Q. Was the lumber of Gage & Co. indiscriminately piled with the lumber of Rife & Stutzman and on their mill yard?

A. Yes.

Mr. BARTELS: I object to the question on the same grounds.

Objection overruled.

Defendant excepts.

Q. In that connection, did you have a plat furnished you or was a plat requested of you by Mr. Fisher, of this property of Rife & Stutzman at Tribbett, Miss.?

Mr. BARTELS: I object to that; it is wholly immaterial whether a plat was furnished to Mr. Fisher or not. The rights of the parties depend upon the contract itself, and any evidence tending to vary or contradict the terms of the written contract, is inadmissible, not only because of an elementary rule to the contrary, but because the parties, under this insurance contract, have agreed that nothing except that which appears upon the contract itself, in writing shall be treated as a waiver of any of the rights of the insurance company.

Objection overruled.

Mr. BARTELS: To the action of the Court in permitting the witness to answer the question, the defendant excepts.

The COURT: You have stated your exception.

Mr. BARTELS: No, I had not to this particular question. I had to the previous question.

The COURT: I thought it was the same question.

Q. Did Mr. Fisher request the furnishing of a plat?

A. He did.

Q. Did you in turn request Rife & Stutzman to furnish you one?

A. I did.

Q. Did Rife & Stutzman then send you a plat?

87 A. They did.

Q. What did you do with that plat?

A. Gave it to Mr. Fisher.

Mr. BARTELS: I object to that question.

The COURT: I don't think it's a competent question.

Mr. BARTELS: I ask the Court to rule it out.

The COURT: I say it's incompetent.

Mr. EWING: I had left the plat before in the hands of Gage & Co., and it was necessary for me to complete the proposition I wanted to make because, although your Honor differed with me, still I had to complete the record.

The COURT: You asked the question and I excluded it.

Mr. EWING: I knew in view of your Honor's previous ruling that it was going out, but I had to ask it to complete the record.

Q. In February, 1909, or about that time did you go to Mr. Fisher and explain to him that L. H. Gage & Company's and Rife & Stutzman's Lumber were on the same yards and were indiscriminately mixed?

Mr. BARTELS: I object to the question.

The COURT: I don't see how any conversation between this witness and Mr. Fisher, the representative of the Insurance Companies is competent here.

Mr. EWING: I merely wanted to show by this witness that he explained to Mr. Fisher about the barn and the conditions there.

Objection sustained.

Plaintiff excepts.

Q. I notice in insurance they make exceptions on clear spaces. Is there any charge for an exception of a barn or any other thing in an insurance policy with respect to the clear space clause.

Mr. BARTELS: What has that got to do with the issues in this case?

Mr. EWING: If you want me to tell you I will do it.

Mr. BARTELS: What is the purpose and object of the testimony?

Mr. EWING: To show that exceptions are made where there is any doubt about it, about the right to have it, if the company will call attention to it, and I expect to follow it up in this case with the fact that the Company did call Gage & Company's attention to certain exceptions and these exceptions are made without any change of rate and without any cost whatever and that there is no consideration for refraining from having them entered in it; it is a mere matter of notice or knowledge.

88 The COURT: I don't think it is competent; however, I am not ruling on the question as to whether or not these particular objects that were occupying the clear space, fall under the prohibitive rule.

Mr. EWING: I understand, it's a different proposition entirely. I understand the Court declines to permit me to show by this witness, and I want the records to show that we offered to show it, that exceptions of matters that do not increase the hazard, although they may be strictly and technically within it, are made without charge and on request.

Q. Mr. Blair, did Mr. Fisher call your attention to the fact that his Company had sent an inspector to this property and had examined it prior to or some time in May or June, 1909, and that the Company had the report of this inspector showing the condition?

Mr. BARTELS: I object to the question. It is not relative to the matter at issue and is wholly immaterial and irrelevant.

Objection sustained.

Mr. EWING: The plaintiff excepts — the ruling of the Court and offers to show that the insurance association itself received the report of this inspector.

Here the Plaintiff rested; whereupon the following occurred:

Mr. BARTELS: I desire to make a motion for a peremptory instruction on behalf of the defendant.

The COURT: Just state your grounds.

Mr. BARTELS: Upon the ground (1) that upon the evidence of Mr. Stutzman, there was not a maintenance of 100 feet clear space between the lumber and the mill, upon the ground (2) that the warranty relative to maintaining a clear space is in the nature of a condition precedent and that under the express wording of that warranty, it was agreed that a clear space of one hundred feet should be maintained at all times during the life of the policy; that being a condition precedent, the burden of proof rested upon the plaintiff, not only to prove that the clear space was maintained at the time of the fire, but to affirmatively prove that the clear space was actually maintained throughout the life of the contract of insurance; and (3) upon the ground that it is wholly immaterial, so far as the rights of the parties are concerned, under this warranty, whether the fire in the lumber was brought about by the fire spreading from the mill to the lumber platform and the barn, or whether it was brought about by the fire spreading from the mill to the lumber and then to the lumber platform. Those are the grounds upon which I ask the court to peremptorily instruct the jury to bring in a verdict in favor of the defendant.

The Court overruled the motion above stated, to which action of the Court the defendant excepted and introduced the following evidence.

Defendant's Evidence.

E. M. LINDSEY, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BARTELS:

Q. What is your name?

A. E. M. Lindsey.

Q. Where do you live?

A. Memphis.

Q. What is your occupation?

A. Adjuster of fire insurance losses.

Q. Do you know O. C. Rife, or F. A. Stutzman?

A. I know Mr. Rife.

Q. Did you have anything to do with adjusting a loss that occurred under policies issued to Rife & Stutzman at Tribbett, Miss., for the Lumber Underwriters?

A. Yes, sir.

Q. In making that adjustment, did you or not visit the scene of the fire?

A. Yes, sir; I visited the scene of the fire.

Q. What was the condition of the lumber yard at the time of your visit with particular reference to the distances between the lumber insured and the mill, and any intervening obstacles between the lumber and the mill?

A. The majority of the lumber that had been on the ground was in ashes. The distance from the mill to the lumber was about 160 feet, that space, however, had intervening a barn building, and a lumber platform.

Q. Mr. Lindsey, did you or not make a diagram of this yard, showing the location of the mill and the lumber insured and the other obstacles upon the yard?

A. Yes, sir.

Q. Have you that diagram with you?

A. Yes, sir.

Q. Please refer to it Mr. Lindsey and state what was the distance between the mill and the lumber platform?

A. It was 72 feet.

Q. What was the size of the lumber platform?

90 Mr. EWING: I object; he said he only saw the ashes. I am perfectly willing for him to state what the size of the ash pile was.

The COURT: Let him state what the width of the ground was covered by the ashes.

Mr. EWING: I've no objection to that.

Mr. BARTELS: I'll change the question.

Q. What was the distance of measurement of the ground showing the width of the lumber platform?

A. The width—15 feet.

Q. What was the distance from the south line of where the lumber platform was to the north line of where the barn was?

A. About one foot.

Q. What was the width of the barn, or of the ground upon which the barn stood?

A. 16 feet; what was the width.

Q. What was the distance from the south side of the barn, or from the point where the south side of the barn was, to the lumber?

A. 80 feet.

The COURT: That would make 175 feet; wouldn't it, the whole space?

Mr. EWING: Your Honor is a mathematical genius.

Mr. BARTELS: There is the diagram, you can see.

The COURT: Well I've counted it up, and according to my count it's 175 feet.

Mr. EWING: Your Honor can go to the head of the class on this one. I can't do it, except with a pencil.

The COURT: Ask the witness if that was the sum total of the distance. I haven't run that up with a pencil either.

Q. Take a pencil and add it; 72 and 15 and 1 and 16 and 80.

A. It's 196 feet.

Q. What did you find upon your investigation to have been upon the premises or yard between the saw mill and the lumber that was insured?

Mr. EWING: I object; let him state what was there, whether an ash pile or something else. What somebody else told him wouldn't be competent.

The COURT: Yes, he couldn't state unless he had seen it before.

Q. Did you have any conversation with Mr. Rife or Mr. Stutzman at the time?

A. I had with Mr. Rife.

Q. Did Mr. Rife make any statements to you relative to certain lumber platforms and barns upon this yard?

91 A. Yes, sir.

Q. Did he point out to you where they were located?

A. He did.

Q. Where were the lumber platform and the barn located, as pointed out to you by Mr. Rife, with particular reference to the saw mill and the lumber?

A. The lumber platform, as just stated, was south-west of the mill and was 72 feet from the southwest corner to the northeast corner of the lumber platform, as pointed out by Mr. Rife.

Q. Did you find the remains of the lumber platform and the barn there at the time you made your examination?

A. Just from the burned wooden columns.

Q. Did you make a measurement from the mill directly south to the lumber?

A. Yes, sir.

Q. What was the distance between the south line of where the mill stood to the lumber on the south, as you measured it?

Memo Lumber
Rife

Dry.

Lumber on
Drive Way

Lumber on the
(Gum & Cypress)
75.6

Rife St

W.

Y & M. D. R. R. Co.



Lumber

Lumber

no. 219
 lumber underwritten } p. 9/11/12
 Rife and Stutzman.

memo, ^NLumber Lusa,
 Rife and Stutzman.

Lumber on this space

Drive Way

Black
 Smith
 Shop
 16

90
 Saw Mill
 Band Mill 36
 Capacity 20,000 ft

Boiler
 Engine

Lumber on this space.
 (Gum & Cypress) Sawed property
 75,000 to 100,000 ft.

Rife Stutzman Ry.

80
 Lumber
 Platform 15

Lumber Burned.

Barn
 30 16

Lumber,

25

E

130 feet.

Exhibit "A"
 to Stutzman

100 feet

A. From the boiler room on a straight line across to the marks showing where lumber had stood at that place was 130 feet—the boiler house adjoined the mill.

Q. Were you assisted by either Rife or Stutzman at the time you made these measurements?

A. Yes, sir.

Q. By which one?

A. By Mr. Rife.

Q. In what way?

Mr. EWING: May I inquire, for the purpose of shortening the matter, if there is any dispute as to the measurements?

Mr. BARTELS: What measurements?

Mr. EWING: Any of these measurements?

Mr. BARTELS: Not unless you dispute them.

Mr. EWING: I am not disputing them, and I object to these questions about who carried the tape and all that. Mr. Rife admitted that he did.

Mr. BARTELS: My object is to show that Mr. Rife practically verified the measurements made by Mr. Lindsey.

The COURT: He concedes it here.

Q. Have you a diagram there that you made, Mr. Lindsey?

A. Yes, sir.

Mr. EWING: That's the same thing as the other diagram.
(Marked E. M. L.)

92 Mr. BARTELS: Yes, sir; exactly the same, only that is the original. I desire to offer this original diagram that Mr. Lindsey made, as evidence to show the conditions of the yard and I desire to mark it "Exhibit A" to Mr. Lindsey's testimony.
(Exhibit A Plat to Lindsey's.)

(Here follows diagram marked page 92½.)

93 Cross-examination waived.

This was all the evidence introduced, whereupon the following occurred:

The COURT: Now, as I understand, that raises the question whether or not this occupation of this 100 feet space by a house or platform, or whatever it was used for, was such a violation of the contract as to prevent the recovery upon the policy.

Mr. BARTELLS: Yes, sir. I want to state the specific ground for my motion for a peremptory instruction and get the benefit of an exception in the event the Court should overrule it.

The COURT: All right, make your motion specifically.

Mr. BARTELLS: I move the Court to peremptorily charge the jury in favor of the defendant, and as grounds for the motion say (1) the undisputed evidence shows a violation of the clear space warranty of 100 feet; (2) that the clear space warranty contained in the policy sued upon is a promissory warranty and a condition precedent, the burden of proof rests upon the plaintiff and he must prove, not only the maintenance of the clear space warranty at or immediately previous to the fire, but he must show that it was maintained throughout the life of the contract of insurance; and there is no affirmative proof on that particular point in this cause; (3) that it is wholly immaterial as a matter of law, whether the obstacles intervening between the lumber insured and the mill working plant, contributed or did not contribute to the loss. For these reasons, and upon these grounds I move the Court for a peremptory instruction in favor of the defendant.

At the conclusion of argument by counsel on the facts and law of the case, the Court granted the motion of the defendant for a peremptory instruction in its favor, to which action of the Court the plaintiff- excepted.

The Plaintiffs O. G. Rife and F. A. Stutzman, tenders this, their Bill of Exceptions, to the judgment of the Court, which is signed and sealed and Ordered to be made a part of the record.

JNO. E. McCALL,
United States District Judge.

(Here follows insurance policy, marked page 94.)

CHART

TOO

LARGE

FOR

FILMING

95 In the Circuit Court of the United States for the Western
Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Filed Aug. 2, 1911. Dan. F. Elliotte, Clerk.

Petition for Writ of Error.

The Plaintiffs, O. C. Rife and F. A. Stutzman, in the above styled case feeling themselves aggrieved by the verdict of the jury and the judgment of the Circuit Court of the United States of America for the Western Division of the Western District of Tennessee thereon in favor of the defendant, the Lumber Underwriters of New York, and against the said plaintiffs as entered on the 14th day of June, 1911, come now by their attorneys of record in this case, C. L. Marsilliott and Caruthers Ewing, and petition said Court for an order allowing said plaintiffs to prosecute a writ of Error to the Honorable the United States Circuit Court of Appeals for the Sixth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs shall give and furnish upon said writ of error, and that upon the giving and furnishing of such further proceedings in the Circuit Court of the United States for the Western Division of the Western District of Tennessee be superseded, suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Sixth Circuit.

Said plaintiffs accompanying this petition for Writ of Error with their written Assignment of Error- which are intended to be urged by them, which they ask to be filed by the Clerk of this Court as a part of the record in this case.

And your petitioner will ever pray, etc.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for the Plaintiffs.

Granted:

JNO. E. McCALL,
United States Dist. Judge.

In the Circuit Court of the United States for the Western Division
of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Filed August 2, 1911. Dan F. Elliotte, Clerk.

96

Assignment of Errors.

The plaintiffs, Rife and Stutzman, in connection with their petition for a writ of error makes the following assignment of errors, which they aver occurred upon the trial of the cause, to-wit:

1.

It was error in the Court to peremptorily instruct the jury to find in favor of the defendants. On the undisputed evidence the plaintiffs were entitled to a judgment on the policy sued on.

2.

The Court erred in sustaining the objection of the defendant to evidence offered by the plaintiffs in the examination of the witness O. C. Rife, as follows:

(a) Plaintiffs offered to prove by said witness that when application was made for policies on the property sued on prior in point of time to the policy made the basis of this suit and which was one of renewal of earlier policies, that the said Rife explained to D. A. Fisher the exact condition of the lumber, mill and buildings.

(b) The Court erred in declining to permit the plaintiffs to prove by the witness Rife that the plat and plan of the mill site and property thereon which was prepared before the policy sued on was issued was sent by the witness to L. H. Gage & Co. (on the understanding that it would be delivered to the defendant Company) for the purpose of placing the company in possession of full knowledge of conditions existing and with reference to the manner and method of piling lumber on the mill yard.

(c) The Court erred in declining to permit the witness Rife, one of the Plaintiffs, to testify that the policy sued on was delivered to him and that he did not read it. And it was error in the Court to refuse to permit the witness Rife to testify that he relied upon the issuance policy complying with the terms of the contract he had made with D. A. Fisher, agent of the defendant.

(d) The Court in refusing to permit the witness Stutzman, one of the Plaintiffs, to testify that in 1909, before the issuance of the policy sued on and while the policy of which this is a renewal was in existence, an inspector of the defendant, the Lumber Under-

writers, came to the mill of the plaintiffs and made a plan and plat thereof and made measurements and observations whereby the defendant was informed of the conditions which existed at that time and which continued to exist up to the time of the fire. In this connection, the Court erred in refusing to permit the plaintiffs to prove by the witness Stutzman that the defendant Company, with knowledge of every fact and circumstance and condition existing at the time of the fire, received a premium on the policy in existence at the time this knowledge was acquired and with this knowledge issued the policy sued on and retained the premium thereon and that the defendant company thus being made acquainted with all the facts and circumstances permitted the policies to remain in force and made no objection whatever thereto.

(e) The Court erred in refusing to permit the plaintiffs to prove by the witness Blair that Mr. Fisher, the agent of the defendant, requested that he be furnished with a plan and plat of the mill and lumber as to which insurance was sought and that the witness procured such a plan and plat from the plaintiffs and furnished it to D. A. Fisher, agent of the defendant.

(f) The Court erred in refusing to permit the plaintiffs to prove by the witness Blair that prior to the issuance of the policies of insurance on lumber the exact conditions were explained to D. A. Fisher, the agent of the defendant, with especial reference to the location of the barn and that with this knowledge and after this explanation the policies were issued.

(g) The Court erred in declining to permit plaintiffs to prove by the witness Blair that an exception of a barn, oil house or elevator drive way from the clear space clause are made by insurance companies on request and without any change of rate or expense and that the existence of obstructions on the plaintiff's mill yard were not matters that increased the rate of premium and that on notice or knowledge the insurance companies, and notably the defendant, were in the habit of excepting same from an alleged violation of a clear space clause.

(h) The Court erred in declining to permit the plaintiffs to prove that D. A. Fisher, the agent of the company, called to the attention of the witness Blair the fact that the defendant company had sent an inspector to the property insured and had examined it prior to or some time in May or June, 1909, and that at the time of issuing the policy sued on the company had the report of this inspector and has knowledge of existing conditions.

The Court erred in declining to permit the plaintiffs to prove that prior to and at the time of the issuance of the policy sued on the defendant association had in its possession a plan and plat of plaintiffs' mill showing exactly how plaintiffs piled their lumber with respect to the mill and showing the existence of every building and structure, which are now claimed to have been violations of the clear space clause; that the defendant association with this knowledge and information issued plaintiffs a policy of insurance and accepted and retained the premium thereon and

that said policy of insurance contained the same provisions as the policy sued on; that with all this knowledge and information the defendant association issued the policy sued on and accepted and retained the premium; that at no time and in no way were plaintiffs informed that defendant construed the structures to be a violation of the clear space clause of the policy, nor were plaintiffs given any notice nor did they have knowledge that the defendant association objected to the conditions as they existed, nor were plaintiffs given any notice or knowledge that the defendant association claimed that the policy had not been and was not continuing to be in force and effective.

Plaintiffs say that it was error in the Court not to permit the plaintiffs to show all of the facts and circumstances attending the issuance of the policy to the end that the jury might determine whether the defendants had by its conduct lulled the plaintiffs into the belief that plaintiffs were not, as the parties construed the contract, violating the clear space clause, to the end that the jury might determine from all the proof whether the defendant association had estopped itself to set up, after the loss, a claim that the policies had never been effective or had been forfeited.

4.

The Court committed various and sundry errors in the trial of the case with reference to the admission and rejection of evidence and in determining and declaring the rights to the parties under the law and in directing a verdict for the defendant.

Wherefore, plaintiffs pray that the judgment of the Circuit Court may be reversed.

C. L. MARSILLIOTT,
CARUTHERS EWING,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit:
99 the 2nd day of August, A. D. 1911, in the following cause, to-wit:

No. 4043.

O. C. RIFE & F. A. STUTZMAN, Plaintiffs,
vs.
LUMBER UNDERWRITERS, Defendants.

Law Dkt. No. 4, Page 284.

Order Granting Plaintiffs' Petition for a Writ of Error.

This day came the Plaintiffs by their attorneys of record herein and presents to the Court and files herein their Petition praying for the allowance of a Writ of Error to the United States Circuit Court of Appeals for this, the Sixth Judicial Circuit, to be holden at the City of Cincinnati, in the State of Ohio, together with their assignment of Errors in such behalf;

Upon consideration Whereof, the prayer of said Petition is hereby granted and such Writ of Error awarded, upon the filing of a Writ of error bond herein in the penal sum of Five Hundred (\$500.00) Dollars with good and sufficient surety according to law.

Enter:

McCALL, Judge.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

No. 4043.

O. C. RIFE et al.

vs.
LUMBER UNDERWRITERS OF NEW YORK.

Bond on Writ of Error.

Filed Aug. 2, 1911. Dan. F. Elliotte, Clerk.

Known All Men By These Presents, That we, O. C. Rife and F. A. Stutzman, as principals, and C. L. Marsilliott and Caruthers Ewing, as sureties, are held and firmly bound unto the said defend-

ant, the Lumber Underwriters of New York, in the full and just sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be paid to the said defendant in error, the Lumber Underwriters of New York, its certain attorneys, representatives or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, representatives, administrators and assigns joint- and severally by these presents.

Sealed with our seals and dates this 2nd day of August, A. D. 1911.

Whereas, lately at a Circuit Court of the United States for the Western Division of the Western District of Tennessee in a suit pending in said Court, between O. C. Rife et al., as plain-
 100 tiffs, and the Lumber Underwriters of New York, as defend-
 ant, a judgment was rendered against the said O. C. Rife, et al., plaintiffs, and the said O. C. Rife, et al., plaintiffs, having obtained a writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lumber Underwriters of New York, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in said Circuit on the 28th day of August next.

Now, the conditions of the above obligation is such that if the said O. C. Rife, et al., shall prosecute said writ of error to effect and answer all costs and damages if they fail to make the said plea good, then the above obligations to be void, else to remain in full force and virtue.

O. C. RIFE,
 F. R. STUSZMAN,
 By C. EWING, *Att'y.*
 CARUTHERS EWING,

— — —, *Sureties.*

Signed, sealed, delivered, acknowledged and taken before me this 2 day of August, A. D. 1911.

DAN. F. ELLIOTTE, *Clerk.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States, before you or some of you between O. C. Rife and F. A. Stutzman as plaintiffs and Lumber Underwriters as defendants, a manifest error hath happened to the great damage of the said O.

C. Rife and F. A. Stutzman as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if the judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the

United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati in said Circuit of the 28 day of Aug., A. D. 1911 next, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Edward Douglass White, Chief Justice of the United States and the Seal of said Circuit Court the 2nd day of August, A. D. 1911, and of the Independence of the United States, the 136th year.

[SEAL.]

DAN F. ELLIOTTE,
*Clerk of the Circuit Court of the United
States, Western District of Tennessee.*

Allowed by:

JNO. E. McCALL,
U. S. District Judge.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Sixth Circuit.

No. 4043. Law.

O. C. RIFE et al.

VS.

LUMBER UNDERWRITERS.

Citation.

To the Lumber Underwriters, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in the State of Ohio in said Circuit, on the 28 day of August next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein O. C. Rife, et al., are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the

United States, this the 2nd day of August in the year of our Lord One Thousand, Nine Hundred and Eleven, and of the Independence of the United States the one hundred and thirty-sixth year.

[SEAL.]

JNO. E. McCALL,

United States District Judge.

102

Acceptance of Service.

As Counsel for the Lumber Underwriters, Appellees, we do hereby accept due and legal service of the foregoing Citation and acknowledge to have this day received a copy thereof.

This August 2nd, 1911.

TREZEVANT, BARTELS & TREZEVANT,

Attorneys for Lumber Underwriters.

Original Citation.

In the United States Circuit Court for the Western Division of the Western District of Tennessee.

O. C. RIFE & F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS.

As Counsel for the herein named defendant in error we, Trezevant, Bartel & Trezevant, do hereby accept due and legal service of this writ of error, and acknowledge to have this day received a true, perfect and correct copy of same. This August 2nd, 1911.

TREZEVANT, BARTELS & TREZEVANT,

Att'ys for Appellee.

UNITED STATES OF AMERICA,

Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 19th day of August, A. D. 1911, in the following cause, to-wit:

No. 4043.

RIFE & STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Order Extending Time for Filing Transcript in Appellate Court.

In this cause, it appearing to the Court that additional time is necessary to complete and file the Transcript of the record and

proceedings had herein, in the United States Circuit Court of Appeals, for this, the Sixth Judicial Circuit;

It is therefore Ordered by the Court that this time be, and it is hereby enlarged and extended to Monday, October 2nd, next, within which to complete and file said transcript with the said Appellate Court.

Enter:

McCALL, Judge.

103 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House, in the City of Memphis, in said District, on to-wit: the 20th day of September, A. D. 1911, in the following cause, to-wit:

No. 4043. Law.

O. C. RIFE and F. A. STUTZMAN

vs.

LUMBER UNDERWRITERS OF NEW YORK.

Order Extending Time for Printing Record, etc.

In this cause, it appearing to the Court that additional time should be allowed for printing the record and filing same in the United States Circuit Court of Appeals, for this, the Sixth Judicial Circuit thereof;

It is therefore hereby Ordered that the Appellant have and is hereby allowed until January 1st, 1912, within which to print and file the required number of copies thereof with the Clerk of said Appellate Court.

Enter:

McCALL, Judge.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, Dan F. Elliotte, Clerk of the Circuit Court of the United States, for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are a full, true, perfect and correct copies of the originals and of the entire record and proceedings had, (including the Original Writ of Error and Citation) in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit:

No. 4043.

O. C. RIFE and F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

In Testimony Whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in the City of Memphis, Tennessee, this 20th day of September, A. D. 1911, and of the Independence of the United States the 136th Year.

[SEAL.]

DAN F. ELLIOTTE, *Clerk.*

104

Authentication.

I, Jno. E. McCall, a Judge of said Court, do hereby certify that Dan F. Elliotte, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, Clerk of said Court, and that his attestation is in due form.

JNO. E. MCCALL,

*Judge of the District Courts of the United
States for the District Aforesaid.*

105

And afterwards to wit on October 2, 1911, præcipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2232.

O. C. RIFE et al.

VS.

THE LUMBER UNDERWRITERS.

Præcipe.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the plaintiffs in error.

CARUTHERS EWING.

And afterwards to wit on December 4, 1912, an entry was made upon the Journal of said Court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2232.

O. C. RIFE & F. A. STUTZMAN

VS.

THE LUMBER UNDERWRITERS.

Entry.

Before Warrington, Knappen & Denison.

This cause is argued by Mr. Caruthers Ewing for the plaintiff-
in error and by Mr. R. Lee Bartels for the defendant in
106 error and is submitted to the Court.

And afterwards to wit on April 11, 1913, judgment was entered
in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2232.

O. C. RIFE & F. A. STUTZMAN

VS.

THE LUMBER UNDERWRITERS.

Error to the Circuit Court of the United States for the Western
District of Tennessee.

Judgment.

This cause came on to be heard on the transcript of the record
from the Circuit Court of the United States for the Western District
of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged
by this Court, that the judgment of the said Circuit Court, in this
cause be and the same is hereby reversed with costs and the cause
is remanded to the District Court of the United States for the West-
ern District of Tennessee with directions to award a new trial.

Leave is given to the defendant to apply to the District
107 Court for an amendment of its removal proceedings to con-
form to the facts. Failing such prompt application, the
case should be remanded to the state court.

And on the same day, to wit, April 11, 1913, an opinion was filed
in said cause which is in the words and figures as follows:

Opinion.

108 Filed April 11, 1913. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2232.

O. C. RIFE and F. A. STUTZMAN, Plaintiffs in Error,
vs.
THE LUMBER UNDERWRITERS, Defendant in Error.

Error to the Circuit Court of the United States for the Western
District of Tennessee.

Submitted December 4, 1912; Decided April 11, 1913.

Before Warrington, Knappen and Denison, Circuit Judges.

KNAPPEN, *Circuit Judge*:

Plaintiffs in error sued upon two policies of insurance issued by defendant in error, for the recovery of fire loss upon a stock of lumber and other property in plaintiffs' mill yard. Plaintiffs submitted to non-suit as to one policy. As to the other, verdict was directed for defendant.

1. The suit was begun in a state court of Tennessee. It was removed to the federal court for alleged diversity of citizenship of the parties. No motion to remand was made. On the hearing here, the question whether the suit was lawfully removed was raised by a member of this court.

That it is the duty of this court to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court, either in the court below or on appeal, is established by a long line of decisions, among which are *Great Southern, etc., Hotel Co., v. Jones*, 177 U. S., 449, 453; *Fred Macey Co. v. Macey* (C. C. A. 6th Cir.), 135 Fed., 725, 726; *Chicago, etc., Ry. Co. v. Willard*, 220 U. S., 413, 419. The question of jurisdiction arises in this way:

In the title to the bill of complaint the defendant was described as "an insurance corporation or association doing business in Tennessee." The petition for removal asserted that the defendant

109 then, and at the time suit was begun, was a resident and citizen of the State and City of New York, and a non-resident of the State of Tennessee, and that the plaintiffs were residents and citizens of Tennessee and Mississippi, respectively. Service of subpoena had been made upon an agent representing the defendant in Tennessee. After the removal, defendant appeared specially, denying the authority of the alleged agent to accept or acknowledge such service and challenging the jurisdiction of the court over its person; alleging that defendant was not a corporation or a joint

stock company, but a voluntary association composed of fifteen individuals named, each of whom (correcting what is conceded to be an error in the printed record as to the stated residence of one member) was alleged to be a citizen and resident of a specified state other than Tennessee; and (according to the undisputed statement in brief of defendant's counsel) was, in effect, alleged to be a citizen of a state other than Mississippi. Alias summons was served upon the commissioner of insurance, as provided by the Tennessee statutes, under which (Shannon's Code, Sec. 3298) associations formed, as is defendant, upon the plan of "Lloyds," are authorized to transact in that state insurance other than life upon the same terms and conditions as required of "insurance companies of the United States or one of the United States"; the defendant association having duly authorized the commissioner to acknowledge service of all legal process. Supplemental process also issued against the attorney in fact of the association. The plea to the merits alleged that the association was not a "legal entity," and was neither a corporation nor a joint stock company.

It is well settled that the record must affirmatively show jurisdiction to make the removal, and that the facts necessary to show diversity of citizenship may not be left to argument or inference. *Laden v. Meek* (C. C. A. 6th Cir.), 130 Fed., 877; *Thomas v. Board of Trustees*, 195 U. S., 207, 210. Diversity of citizenship does not appear with sufficient definiteness of detail upon the record in the state court. The bill of complaint does not unequivocally allege that defendant was a foreign corporation, or even a corporation; nor does the petition to remove allege the defendant to be a corporation; much less that it is organized under the laws of a state other than Tennessee or Mississippi. The mere assertion that it is a "resident and citizen of the State of New York * * * and a non-resident of the State of Tennessee," is not necessarily more than a mere conclusion of the pleader, and standing by itself is not sufficiently definite. *The Lafayette Ins. Co. v. French*, 18 How., 405; *Great Southern, etc., Hotel Co. v. Jones*, *Supra*, at p. 454; *Fred Macey Co. v. Macey*, *supra*, 725. And an allegation that defendant is an "association" which is not a corporation is not a citizen within the meaning of the Statutes regulating jurisdiction. *Chapman v. Barney*, 129 U. S., 677, 682; *Gt. Southern, etc., Hotel Co. v. Jones*, *supra*, at pp. 449, 456, 457; *Thomas v. Board of Trustees*, *supra*, at p. 216; *Fred Macey Co. v. Macey*, *supra*, at pp. 726, 727.

The petition for removal, in addition to what has already been stated, contained an assertion of the requisite jurisdictional amount in dispute, and an allegation that "the controversy in said suit is between citizens of different states." The record in the state court as to diversity of citizenship thus showed in general terms: (a) the existence of a controversy between citizens of different states (b) defendant's residence in and citizenship of New York; and specifically (c) plaintiffs' residence in and citizenship of Tennessee and Mississippi, respectively.

It is true the petition misstated defendant's citizenship and resi-

dence, but such misstatement, not being challenged, did not affect the jurisdiction to remove. While, therefore, the record in the state court was deficient in that it failed to show the legal status of the defendant (whether a corporation or an association), it contained assertions in the language of the statute of the existence of the elements entitling defendant to a removal. We, therefore, think the record in the state court was not so fatally lacking in showing a jurisdiction to remove as to preclude amendment in the federal court, by way of correct and definite showing of the actual status and citizenship of the defendant association and the members composing it. We think this conclusion sustained by the decision in *Kinney v. Columbia Savings & Loan Assn.*, 191 U. S., 78, which materially relaxed the strictness formerly applied to the question of jurisdictional showing in removal proceedings. It is true that in the *Kinney* case the application in the federal court, to amend the petition for removal, was made before any proceeding on the merits; but we are unable to see that that feature is important where, as here, the record in the federal court, before any proceeding had therein on the merits, showed (as asserted) diversity of citizenship and thus actual jurisdiction to remove. We think the case distinguishable from *Thomas v. Board of Trustees*, *supra*, and *Fred Macey Co. v. Macey*, *supra*, in that the court could see, as matter of law, from the face of the record, that the Board of Trustees (in the *Thomas* case) and the partnership association (in the *Macey* case)

111 were not and could not be citizens within the meaning of the statutes relating to removal, while in this case defendant might be an "association" and yet be a corporation. We see no merit in the suggestion that the individual members of the defendant association have not asked removal. If the association could be sued as such, we think it could lawfully take the necessary steps in its defense, including removal.

2. The policy contained a warranty by the assured that "a continuous clear space of 100 feet shall at all times be maintained between the property hereby insured and any wood-working or manufacturing establishment." The undisputed proofs show that at the time of the fire the distance between the mill and the lumber yards was more than 100 feet, and that in one direction there was a continuous clear space of more than 100 feet between the mill and the lumber. In other directions, however, and thus between the mill and certain of the lumber piles, there intervened an oil house, a barn and an elevated driveway. The existence of these three structures was clearly a violation of the "continuous clear space" provision. They naturally increased the risk, and the effect of this violation is not taken away by the fact that the fire was actually communicated from the mill to lumber piles more than 100 feet therefrom, without the agency of these intervening structures. It was because of the violation of the clear space provision that verdict was directed for defendant. In the absence of evidence of waiver this direction was correct.

Plaintiffs contended that defendant had waived this clear space provision, and in proof of their contention offered to show, in sub-

stance, that shortly before the issuance of the present policy, and while its predecessor policy was in force, defendant's inspector made measurements and observations of the mill yard, and ascertained the then existing conditions; that the company had the report of the inspector showing the conditions, and that the conditions so shown were substantially and practically the same as at the time of the fire, and that no objection was made by the company on account of the existence of the conditions referred to. The argument in substance is that by accepting the premium and issuing the policy, the company is estopped to declare the policy void by reason of a condition which it knew existed when the policy issued, and which it had reason to believe was expected to continue during the policy period.

112 We think the offer broad enough to embrace proof that the "home office" or the general managing officers of the company (as distinguished from a mere agent) actually received the inspector's report. Plaintiffs offered to show "that the insurance association itself received the report of this inspector." The policy contains the express provision that "no agent or other representative of the underwriters shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or attached hereto, and as to such provisions and conditions no agent, or representative, shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The alleged waiver is not written upon or attached to the policy, and defendant invokes the above provision as absolutely precluding the assertion of the alleged waiver.

In *Assurance Co. v. Building Assn.*, 183 U. S., 308, an exhaustive examination and discussion is had of the authorities relating to waiver of conditions in insurance policies, and to the prohibition against altering or contradicting unambiguous written contracts by parol evidence. That case involved a provision as to waiver in the identical language found in the policy before us. Justice Shiras, in the enumeration of the principles sustained by the authorities, included the propositions (p. 361) "that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

That the defendant here might effectually waive the "clear space" provision in question is established by *Assurance Company v. Building Association*. The objection that the policy makes the waiver ineffective unless written upon or attached to the policy, is disposed of by the decision of this court in *Etna Life Ins. Co. v. Frierson*, 114

Fed., 56, where it was held in an opinion by Judge (now Mr. Justice) Lurton, that such provision may be itself waived as well as any other, and that the question in every such case is whether the waiver has been made by the corporation or by one authorized to act for it in the matter. Forfeitures are not favored, and any course of action on the part of an insurer which leads the insured necessarily to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon forfeiture, although it might be claimed under the express letter of the contract. This principle has been applied in the following cases, among others: *Insurance Co. v. Wolff*, 95 U. S., 326, 330; *Insurance Co. v. Eggleston*, 96 U. S., 572, 577; *Queen Ins. Co. v. Union Bank & Trust Co.*, (C. C. A. 6th Cir.), 111 F., 697; *Etna Life Ins. Co. v. Frierson*, *supra*, at p. 63; *Supreme Lodge v. Wellenvoss* (C. C. A. 6th Cir.), 119 F., 671, 675.

We do not think that defendant's knowledge at the time the policy issued, that lumber was piled within 100 feet of the mill, would necessarily estop defendant from urging such breach of the "clear space" warranty as avoiding the policy. *Shingle Co. v. Insurance Co.*, 91 Mich., 441. The specific location of lumber piles is or may be more or less temporary in nature, and, as affecting such structures, a warranty might well be considered promissory in nature. On the other hand, the barn, the oil house and the lumber platform, were more or less permanent in nature; and if defendant, with knowledge of their existence and with reason to believe that their continued existence in their then location with respect to the mill and lumber piles was contemplated, elected to receive the premium and issue the policy, it would, we think, be estopped from asserting the continued existence of those structures as a breach of the "clear space" warranty. Whether defendant had such knowledge and reasonable expectation would be a question of fact for the jury; and so of the question whether the knowledge of the location of the structures named, obtained by defendant during the existence of its predecessor policy, could reasonably be presumed to be, or should have been, present in its mind at the time the policy in suit was issued.

We pass by without decision the question whether the alleged waiver was asserted in the declaration, as well as the question whether such assertion was necessary; for we find nothing in the declaration inconsistent with the claim of such waiver in case plaintiffs' contention there stated, that a "clear space" of 100 feet actually existed, should not be sustained; and the objection to the offered testimony did not clearly raise a question of pleading, and thus of the necessity of, or right to, amendment. Plaintiff should be allowed before another trial to make any proper amendment in this regard.

3. Upon the authority of *Assurance Co. v. Building Association*, we think the court rightly rejected the offer to show that defendant's local agent waived the "clear space" provision of the policy. Such alleged waiver was not written upon or attached to the policy,

and there was no offer to show a ratification of his act by the company itself, unless and except as involved in the company's own alleged waiver already discussed. The case is not, we think, affected by the provision of the Tennessee statutes (Chap. 441, Acts of 1907), "that every policy of insurance issued to and for the benefit of any citizen or resident" of the state "shall be held as made in this state and construed solely according to the laws of this state." This statute undoubtedly has the effect of making the policy a Tennessee contract, and requiring its validity and interpretation to be determined by the law of that state. *Russell v. Grigsby* (C. C. A. 6th Cir.), 168 Fed., 577. No law of Tennessee requiring a construction of the waiver provision differently than we have construed it has been called to our attention. Such is not the effect of decisions that a policy provision that no agent has authority to waive any condition, and that no waiver could be recognized unless in writing, may itself be waived.

For the error pointed out the judgment of the circuit court is reversed and a new trial ordered. The defendant may apply to the district court for an amendment of its removal proceedings to conform to the facts. Failing such prompt application, the case should be remanded to the state court.

115 And afterwards to wit on May 7, 1913, a petition for rehearing was filed in said cause in the words and figures as follows:

Petition for Rehearing.

116 In the United States Circuit Court of Appeals, Sixth Circuit.

No. 2232.

O. C. RIFE and F. A. STUTZMAN

VS.

LUMBER UNDERWRITERS OF NEW YORK.

Petition of the Lumber Underwriters for a Rehearing.

To the Honorable Judges of said Court:

The petitioners, Lumber Underwriters, respectfully state that they are much aggrieved by the decision of the Court rendered in the above-styled cause on April 11, 1913.

With the greatest respect and deference to the Court, your petitioners think that there is manifest error in the Court's decision, and therefore respectfully submit this petition for a rehearing.

The grounds upon which this petition is based are as follows:

1. The Court "passed by without decision the question
117 as to whether the waiver relied upon was asserted in the declaration, as well as the question whether such assertion was necessary."

Waiver which constitutes an element of a cause of action must

be specially pleaded; and, being an essential element to support the cause of action based thereon, it is immaterial that the objection offered to testimony relating thereto, did not raise a question of pleading. Proof without pleading cannot support a decree.

2. The doctrine of the law, recognized by the Court in its opinion, that knowledge by the agent of the conditions showing a violation of the clear space warranty, could not be treated as a waiver as against the principal, because it would violate the elementary principle that parol evidence cannot be considered to contradict a written instrument, as well as violate the agreement of the parties that no act should be treated as a waiver of any of the provisions contained in the contract unless it be in writing and attached to the policy, is equally applicable to knowledge acquired by the principal.

Estoppel arises only when the party invoking it has been misled or deceived by the conduct of the party sought to be estopped; and there can be no deception based upon the mere fact of knowledge as to a previous condition of the property, in the face of an express term of a contract, made and delivered subsequent to such knowledge.

118 3. The attempt to show knowledge on the part of the company, of the condition of the property prior to the issuance of the contract sued upon, was by the testimony of a witness that the local agent of the defendant company had made such an admission to him, subsequent to the time when it is claimed the inspector made a plat or plan of the premises and furnished it to his company.

The admission of the agent can be treated as evidence against the principal only when it is made within the scope of his employment, and when it constitutes a part of the *res gestæ*. The statement of Fisher, the agent, was concerning a matter not within the scope of his employment, i. e., the inspection of the premises, and making a plat thereof—a matter performed by an inspector sent by the company—and such statement being made to Blair,—who was not a party insured, nor a representative of the party insured, subsequent to the time when the inspection was said to have been made, was narrative of a past event.

4. The contract sued upon is a complete contract in all respects. Conditions which existed during the time that a preceding contract was in force, and which may have been waived, either expressly or by implication, during the existence of that contract, cannot affect the new contract, either on the subject of waiver or with regard to its terms.

Petitioners respectfully pray this Honorable Court to give further consideration to this case, with regard to the matters above
119 mentioned, and in support of this petition a brief is herewith submitted.

TREZEVANT, BARTELS & TREZEVANT,
Attorneys for Petitioners.

R. L. Bartels, of counsel for the petitioners, certifies that this petition is not interposed for delay; and he further certifies that

in his opinion the matter referred to in the petition is supported by the law and by the facts in the record; that the petition is filed in good faith and in the honest belief that the points therein made are well taken.

R. L. BARTELS.

120

Brief in Support of Petition.

L

Necessity for Pleading Waiver.

The declaration was reformed after the removal, so as to comply with the procedure of the United States Court. It contains two counts: One based upon the contract of insurance, as to which a non-suit was voluntarily taken; and the other based upon the policy known as No. 27,868 for \$5,000.00, the contract in controversy. (Record 37-40.)

The theory of the declaration was that one hundred feet clear space had been maintained between the mill (wood working plant) and the lumber insured. There is nothing in the declaration to the effect that the elevated platform or the oil house or the barn intervened between the lumber insured and the mill, and that the company having knowledge thereof, issued the policy, or made an exception of such structures.

This Court in its opinion on this subject said:

"We pass by without decision the question as to whether or not the alleged waiver was asserted in the declaration, as well as the question whether such assertion was necessary; for we find nothing in the declaration inconsistent with the claim of such waiver, in case plaintiffs' contention there stated, that a clear space of one hundred feet actually existed, should not be sustained; and the objection to the offered testimony did not clearly raise a question of pleading. . . ." (Page 6 of the Printed Opinion.)

The general rule of law, as we understand it, requires a plaintiff who bases a recovery on the ground of estoppel, to specially plead the facts on which estoppel is based. As it is put by Cyc:

"Estoppel as an element of a cause of action is not available unless specially pleaded."

Cyc., Vol. 16, p. 806.

To the same effect are the cases of—

Pearson v. Hardin, 95 Mich. 360.

Gooding v. Underwood, 89 Mich. 187, 190.

Where complainant's claim of title to part of a right-of-way is based on adverse possession, he cannot assert estoppel against the defendant without pleading it.

Sheldon v. R. R. (Mich.), 126 N. W. 1056.

The rule in Tennessee is the same:

Newport Cotton Co. v. Mimms, 103 Tenn. 465, 475.

Read v. Street Railway, 110 Tenn. 317, 330.

Smith v. Cross, 125 Tenn. 163, 176.

While, with relation to waiver relied upon to overcome a provision of an insurance contract, Cooley says:

"It is a general rule that where pleadings contain allegations showing a forfeiture or avoidance of a policy, it is incumbent on plaintiff to plead any waiver or estoppel on which he intends to rely."

Cooley's Briefs on Ins., Vol. 3, 2768.

122 The defendant insurer pleaded a breach of the clear space warranty. (Rec. p. 48.)

This plea was stricken out at the instance of the plaintiffs as irrelevant (Rec. 52), the theory of the plaintiffs' counsel and the Court being that the defense there specially pleaded was permissible under the general issue. Aside from that, the declaration on its face shows that the failure to pay was due to an alleged violation of the clear space warranty. So that the forfeiture of the contract, because of such violation, was clearly in issue and clearly known to the plaintiff. Under the rule announced by Mr. Cooley above, the plaintiffs should have, by way of replication, set up the acts of waiver relied upon.

It being the rule of procedure in the State of Tennessee that estoppel to be available must be specially pleaded, under the Conformity Act, the same procedure applies in the Federal Courts.

If it was essential to plaintiffs' cause of action to plead the facts relied upon by waiver or estoppel, it of course, follows that in case they did not plead them, proof would not support a judgment; and hence the conclusions of the Court that the objection to the testimony offered to show estoppel did not raise a question of pleading, is, in our opinion, inapplicable.

123

II.

Knowledge of the Company.

1.

Character of Evidence Offered to Show Knowledge.

The assignment of error based upon an estoppel by reason of knowledge on the part of the company of the conditions which existed at the plant previous to the issuance of the contract in question, refers to the record, page 88, testimony of James R. Blair.

The Court, in its opinion, referred to the evidence of James R. Blair, and the offer of plaintiffs' counsel to show by him, knowledge of the company, as appears on page 88 of the record. That evidence, taken in connection with the evidence of Stutzman that the conditions which existed at the time of the fire were the same as those which existed when the inspector of the company made his plat, is the only evidence in the record to show knowledge of the company (Rec. 81.)

Referring now to such evidence, which was the basis of the exception, and the basis of the holding of this Court, it will be found that the witness, James R. Blair, was the manager of the Gage Lum-

ber Company. (Rec. 85.) He was not the representative or agent of the plaintiffs, Rife and Stutzman, and not a member of the firm. In March, 1909, previous to the issuance of the policy sued upon, the Gage Lumber Company had some lumber upon the Rife & Stutzman yard. It seems that Mr. Fisher, the agent of the defendant, requested a plat of Blair for the purpose of showing the location of the Gage lumber, and that Blair procured such plat from Rife & Stutzman and turned it over to Fisher. (Rec. 86-87.)

An effort was made to show that in February, 1909, Blair stated to Fisher, the local agent, that the Gage Lumber Company's lumber and Rife & Stutzman's lumber were upon the same yards. Then counsel for the plaintiffs in error propounded the following question:

"Q. Mr. Blair, did Mr. Fisher call your attention to the fact that his company had sent an inspector to this property and examined it prior to or some time in May or June, 1909, and that the company had the report of this inspector showing the condition?"

Mr. BARTELS: I object to the question. * * *

Objection sustained.

Mr. EWING: The plaintiffs except to the ruling of the Court, and offer to show that the Insurance Association itself received the report of this inspector." (Rec. 88.)

It is apparent therefore, that the offer to show that the company had knowledge of the report made by its inspector was through an admission or declaration made by the local agent of the defendant to Blair, a stranger to the record and to Rife & Stutzman. It is equally apparent that the statement of Fisher made to Blair, was narrative of what had already occurred, i. e., the inspection by the company's inspector and the receipt by the company "prior to some time in May."

Reference to Stutzman's testimony (Rec. 81) will show an attempt to prove that the inspector came to the mill, made his examination, etc., "in 1909, before the issuance of the present policy, and while policy No. 27,566 (former policy) was in existence."

Fisher was the agent at Memphis. He wrote the policies in question and the former policies. The record attempts to show that an inspector from the company—not from Fisher's office—made an inspection prior to the issuance of the contract sued upon, and reported his inspection to the company. (Rec. 81, 85-88.) There is nothing whatever in the record from which it could be inferred that the inspection of the premises was a part of the duty of Fisher, or that he had anything to do with the report of the inspection being sent to the company; but, on the contrary, as stated, the evidence offered by counsel for the insured was that the "company had sent an inspector to the property." (Rec. 88.)

Making the inspection, therefore, was not within the scope of Fisher's employment or authority. A statement or declaration, therefore, made by Fisher as to what the inspector had done, or what his company, i. e., the head office, as distinguished from him as the agent, had done, was a statement that did not relate to a matter within the scope of his employment.

But, assuming that the statement was one which he was authorized to make, it related to a past event, i. e., an inspection already made and already received by the company. Therefore, it was a character of statement which did not constitute a part of the *res gestæ*,
 126 and therefore not admissible as against the principal.

Aside from this, it would seem from a reading of the entire testimony of Blair (Rec. 85-88) that Fisher's conversation with Blair related to the insurance of the Gage lumber—Blair being the manager of the Gage Lumber Company.

I trust the Court will pardon a quotation which I deem appropriate to the matter now being discussed. Mr. Justice Harlan, in considering when the statements of an agent are admissible as against the principal (sought to be proven by the party to whom the agent made them), said:

"The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then pending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ* that it is admissible at all; and therefore it is not necessary to call upon the agent to prove it; but wherever what he did is admissible in evidence, that is competent to prove what he said about the act while he was doing it.

* * * * *

We are of opinion that the declaration of the engineer Herbert, to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. * * * It was in its essence the mere narration of a past occurrence, not a part of the *res gestæ*, simply an assertion or representation in the course of conversation as to a matter not then pending, and in respect to
 127 which his authority as engineer had been fully asserted."

R. R. v. O'Brien, 119 U. S. 99, 104-105.

Now, the matter sought to be proven by the witness Blair was a statement which Fisher, the agent, made to him, not about what he said about the act, while he was doing it. Fisher had nothing whatever to do with the act of making the inspection or sending it to the company. Any information or knowledge that he obtained about it, therefore, must have been obtained aliunde—i. e., from the inspector or from the home office, and Fisher was the proper person to prove the fact of the company's having received the inspection, and not a third party, to whom Fisher had told it.

It seems to the writer that this was simply hearsay evidence.

2.

Knowledge of Company Not a Waiver in Face of the Written Contract.

Does knowledge of a fact acquired previous to the issuance of a contract of insurance, estop an insurer from insisting upon a for-

feiture of a contract subsequently made, by reason of the continued existence of the fact, expressly prohibited by the later policy, when the matter relates to the future use (location) of the insured property throughout the life of the contract, and when the contract itself provides that no act should be treated as a waiver of any of its provisions, unless the waiver be in writing?

128 Unquestionably an insurer may waive a forfeiture or a condition or provision of its contract. But, in so far as the case at bar is concerned, the question is narrowed down to this: Does previous knowledge that permanent structures intervened between the lumber insured and the mill, resulting in a clear space of less than 100 feet, without more, operate as an estoppel against the insurer insisting upon the compliance with a written agreement, subsequently made, to maintain a clear space of one hundred feet between the lumber insured and the mill?

It would seem from the Court's opinion (page 6) that the knowledge of the company of a violation of the warranty previous to the issuance of the policy in question, by the lumber being piled within one hundred feet of the mill, would not operate as an estoppel to insist upon compliance with the clear space warranty. The Court, however, treated the structures as more or less permanent in nature, and the knowledge of such structures obtained during the existence of a predecessor policy, as sufficient to warrant the belief on the part of the insurer as to their continued existence at their then location, with respect to the mill and lumber piles.

How could such a belief in the mind of the insurer arise when at the time it issued its policy it said in effect, "From and after the date of this policy your lumber shall be piled so that one hundred feet of clear space shall exist between it and mill?" This was put into writing and agreed to by the insured when he accepted the
129 policy. Under elementary rules any agreement, whether express or implied, prior to the making of the written contract, became merged in the written contract.

The theory upon which "knowledge" is sought to be charged against the company as an estoppel, is that of an implied agreement; but if the agreement had been expressed between the insured and the insurer prior to the written contract, that the insurer would not insist upon a violation of the clear space warranty by reason of the structures, oral evidence of this agreement could not be considered, in the face of the clear and unambiguous provision of the contract that a failure to keep a clear space of one hundred feet between lumber insured and mill, should avoid the policy.

If, after the issuance of the policy, the company had made such an agreement with the insured, then the company might be estopped to insist upon the condition, unless the agreement contained in the policy, that no estoppel or waiver should arise except it be by written instrument, would operate to prevent the estoppel.

But the mere knowledge by the insurer of the condition of the lumber yard, prior to issuing the policy, certainly could not have deceived or misled the insured, when subsequent thereto, the insured and the insurer agreed that irrespective of such knowledge, the insured would maintain a clear space of one hundred feet. There was

- 130 no act of the insurance company, subsequent to the delivery of the policy, prejudicial to the insured. There was nothing done that induced a change of position by the insured.

The insured had no right to rely upon the knowledge of the company previously acquired, in the face of the contract subsequently made and delivered, that under the policy he was to comply with its conditions and actually maintain one hundred feet of clear space.

"An intent to deceive cannot be inferred from the mere fact of knowledge, in the face of an express term of the contract made and delivered subsequent to such knowledge."

Insurance Co. v. Thomas, 82 Fed. 408.

"The plaintiff in error (insured) could not have been misled or deceived by any information or knowledge which the defendant in error (insurer) had as to the previous condition of the policy."

Kentucky Vermillion Co. v. Insurance Co., 146 Fed. 695.

It is true that in these two cases the knowledge of the insurer in the one instance related to the operation of the property insured (factory), and in the other to the taking out of additional insurance. But in the case at bar the thing insured was the lumber. There was nothing contained in the contract as to the location of the lumber, save as to clear space to be maintained between it and the mill. It could have been piled due south, east or west of the mill, without the structures referred to, or any other structures intervening. (Rec. 67, plat.)

- 131 Assume that the knowledge of the insurer as to the location of the lumber prior to the issuance of the policy in controversy, would in and of itself be treated as sufficient to justify the conclusion that the lumber would be continued to be piled at the same place, with the structures intervening; yet the new contract put into writing is certainly sufficient to overcome such a presumption. The lumber could have been moved so as to have avoided the violation. It was not necessary to move the structures.

But regardless of the character of the structures which brought about the violation of the clear space clause, they can only be treated as excepted, by admitting parol evidence that they were excepted, in the face of the written contract to the contrary.

This Court, in its opinion, page 6, refers to a number of cases applying estoppel as against an insurer; and lays down the doctrine established by the Eggleston case (96 U. S. 572), that the conduct of the insurer which leads the insured necessarily to believe that, by conforming to the course of action suggested by the insurer, there will be no forfeiture, followed by due conformity, will operate as an estoppel.

These cases all relate to the acts and conduct of the insurer subsequent to the delivery of the written contract sued on—the Wolff case, 95 U. S. 326, and the Eggleston case, 96 U. S. 572, relating to a course of dealing between the insurer and the insured, subsequent to the delivery of the policy, under which the insurer permitted the payment of premiums after due date.

132 But in the case at bar, that which is sought to operate as an estoppel, relates to a matter, knowledge of which was acquired prior to the issuance of the policy in controversy, followed by a contract containing a provision directly in conflict with any implied agreement that might be inferred from such knowledge. And instead of the insured "necessarily" believing that compliance with the contract would not be insisted upon, the express terms of the contract are such that insured must have "necessarily" believed that compliance was essential.

The contract is:

"Warranted by the insured that a continuous clear space of one hundred feet shall at all times be maintained, * * * it being expressly agreed and understood by the insured, that a violation shall render the policy void." (Rec. 94.)

The two cases cited by us in our original brief of *Carpenter v. Providence Washington Ins. Co.*, 16 Peters 495, and *Thompson v. Insurance Co.*, 104 U. S. 252, were both cases where that which was sought to be set up by way of estoppel consisted of knowledge acquired by the insurer prior to the execution and delivery of the policy; and the Court in both of those cases held that to permit parol evidence to show such knowledge would violate the elementary doctrine to the contrary.

The *Eggleston* case was distinguished in the case of *Thompson v. Insurance Co.*, 104 U. S. 306, and the distinction, according to my understanding, is that which I have endeavored to make here, to-wit: that the estoppel, based upon matters in conflict with the
133 written contract, cannot arise unless the insured is induced to act to his prejudice, by some conduct or declaration of the insurer, subsequent to the issuance of the policy.

In conclusion, I beg to call the Court's attention to the opinion of Mr. Justice Van Devanter in the case of *Connecticut Fire Insurance Co. v. Buchanan*, 144 Fed. 877. In that case a full discussion of all of the authorities is to be found, including the *Northern Assurance* case in 183 U. S., the *Thompson* case, and the *Carpenter* case, both of which have just been referred to. He there states that much confusion has seemed to arise among the courts upon the subject of estoppel, in relation to insurance contracts, and concludes by saying that the principle of estoppel is not applicable either in law or equity, when such estoppel is based on prior and contemporaneous negotiations and representations which are at variance with the written terms of the contract.

III.

Effect of Former Policy.

Neither the predecessor of the policy in controversy, nor conditions which then existed, can be looked to for the purpose of affecting the rights of the parties under the contract sued upon.

This contract in controversy is complete in all its terms, and is a new, separate and independent contract from any former policy. The minds of the parties have met (must conclusively be presumed

to have met) upon the terms of this contract, and their rights must be governed by those terms.

134 Kentucky Vermillion Co. v. Insurance Co., 146 Fed. 696, 700.

Brady v. Northwestern Ins. Co., 11 Mich. 425, 444.

In the first cited case, an effort was made to introduce oral testimony to show that the insurer had knowledge, during the life of a former policy, that the property insured (a manufacturing plant) was idle. This for the purpose of showing a waiver of a condition in a later policy requiring its operation. The Court, in holding that the conditions as they existed during the prior policy could not be considered, said:

"The second policy was not a mere continuance of the first, though in terms and conditions it was identical with the first, except as to dates. It was not in any manner dependent upon any acts or conduct of the parties under the first policy. The minds of the respective parties met upon the issuance of the policy by the Insurance Company and the payment of the premium by the insured. The second policy then became a new, separate and independent contract between the parties.

In Brady v. Northwestern Insurance Co., 11 Mich. 425, 444, the Court said: 'We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and it was optional with both parties.' * * *

The second policy as delivered and accepted must therefore be presumed to express the entire contract between the parties. The rule is well settled that all parol negotiations, understandings and agreements are merged in the written contract." * * *

135 At the time the knowledge as to the intervening structures was acquired, the contract in question had not been made.

Estoppel cannot arise from a promise as to future action, with respect to a right to be acquired, upon an agreement not yet made.

Ins. Co. v. Mowry, 96 U. S. 544.

In the opinion in the above case, it was said:

"The doctrine (estoppel) has no place for application, when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. * * * For compliance with arrangements, respecting future transactions, parties must provide by stipulation in their agreements, when reduced to writing."

It will be noted that it is provided in the policy that there can be no waiver at all, except by a written agreement. This refers to waiver by a "Representative" of the Company, as well as an ordinary agent. Under the decision in Northern Assurance case in 183 U. S. 308, the parties having agreed upon the manner in which a waiver shall be brought about or effected, that agreement is binding.

If that provision of the insurance policy, requiring written waiver, is binding upon the insured, with relation to waiver invoked against the insurer by the acts or conduct of the agent, it would seem to be

equally binding in relation to waiver claimed by reason of the acts or conduct of the Insurer.

Respectfully submitted,

TREZEVANT, BARTELS & TREZEVANT,

Attorneys for Petitioners.

136 And afterwards towit om May 16, 1913, an order denying said petition for rehearing was entered clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2232.

O. C. RIFE & F. A. STUTZMAN

vs.

THE LUMBER UNDERWRITERS.

Order.

The petition for rehearing filed in this cause is hereby denied.

137 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of O. C. Rife & F. A. Stutzman vs. The Lumber Underwriters, No. 2232, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 30th day of September A. D. 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,

*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

138 - UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which O. C. Rife and F. A. Stutzman are plaintiffs in error, and The Lumber Underwriters of New York are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue

of a writ of error to the Circuit Court of the United States for the Western District of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-
139 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, ss.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 6th day of November, 1913, there was filed in my office a stipulation in the above entitled case in the following words, towit:

Supreme Court of the United States, October Term, 1913.

No. 753.

LUMBER UNDERWRITERS OF NEW YORK, Petitioners,

vs.

O. C. RIFE et al., Respondents.

Stipulation of Counsel as to Return to Writ of Certiorari.

It is agreed by and between counsel representing the petitioners and respondents in the above styled cause that the record filed with the petition for a writ of certiorari may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States on October 29, 1913.

R. L. BARTELS.
CARUTHERS EWING.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of the United States

Circuit Court of Appeals for the Sixth Circuit at the city of Cincinnati in said Circuit this 6th day of November, 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,

Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 23,904. Supreme Court of the United States. No. 753, October Term, 1913. Lumber Underwriters of New York vs. O. C. Rife et al. Filed Nov. 6, 1913. Frank O. Loveland, Clerk. Writ of Certiorari.

140 [Endorsed:] File No. 23,904. Supreme Court U. S., October term, 1913. Term No. 753. Lumber Underwriters of New York, Petitioners, vs. O. C. Rife et al. Writ of Certiorari and Return. Filed November 8th, 1913.

In the Supreme Court of the United States, October Term, 1914.

No. 279.

LUMBER UNDERWRITERS OF NEW YORK et al., Petitioners,
vs.
O. C. RIFE et al.

Stipulation of Counsel with Respect to Misprints in the Record.

It is agreed by and between counsel representing all parties that the following misprints appear in the record as printed, to-wit:

On page 2, in the eighth line from the bottom of the page, the word "manifested" should be "maintained".

On page 10 of the printed record the paragraph with respect to the citizenship of Lewis Dill should read: "Lewis Dill, who is now, and was at the time of the commencement of this suit, a citizen and resident of the State of Maryland, and a non-resident of the State of Tennessee."

On page 65 of the printed record there has been a confusion with respect to the answers to certain questions propounded, contained in the evidence, resulting in answers to questions propounded on page 65 appearing on page 66, etc. The two pages of the record should read as follows:

"A. It wasn't over 16 feet square.

"Q. How high?

"A. Well probably 7 or 8 feet high.

"Q. Do you know how far that was from the mill?

"A. No, sir; I do not.

"Q. What was the closest point between the mill and the lumber? Was it south, or was it southeast and southwest?

"A. Directly south.

"Q. That was the closest point?

"A. Closest point; yes, sir.

"Q. And that exceeded 100 feet?

"A. Yes, sir.

"Q. But it was not 100 feet, as I understand it from the mill to the oil house?

"A. No, sir.

"Q. Nor was it 100 feet from the mill to the barn?

"A. No, sir.

"Q. Something was said yesterday about what Mr. Bartells called a platform; what was that structure, if such it may be called?

"A. Well, it was a roadway that we had for driving up on one end and off on the other, loaded lumber, loading lumber to put in cars.

"Q. The railroad had a switch there?

"A. Yes, sir.

"Q. And that switch track run out on to your yard or near your yard?

"A. It didn't run into the lumber; it run past the lumber there was some lumber piled there.

"Q. What sized lumber was it you used in this drive way?

"A. Well it was 2 inch lumber for a flooring.

"Q. Was it elevated?

"A. Elevated; I don't know exactly how high, probably as high as that table there, a little bit higher, may be.

"Q. How were the ends of this platform?

"A. Roadway right up on to it at both ends.

"Q. You mean to say there was a slant at each end so that you could drive a wagon up on one end and down on the other; is that what you mean?

"A. Yes, sir.

"Q. What was the purpose of this elevated driveway? What did you drive up on there for?

"A. To load lumber in the car.

"Q. You put lumber on a wagon and then drive up on this drive way and put it—

"A. Into the car.

"Q. —into the car?

"A. Yes, sir.

"Q. That was within 100 feet of the mill also, wasn't it?

"A. Yes, sir; I think so.

"Q. Were you present at the time of the fire?

"A. I was there before the fire and after the fire, but it was all burned down when I got there.

"Q. What was the value of the lumber belonging to Rife & Statzman that was destroyed on that year?

"A. Well, I can't say.

"Q. Well about, the nearest you can give us?

"A. Well, somewhere between \$10,000.00 and \$12,000.00.

"Q. That was the lumber your firm owned there?

"A. Yes, sir.

"Q. What insurance did you have except this \$5,000.00 policy?

"A. We had \$2,000.00.

"Q. In the same company?

"A. Yes, sir.

"Q. Were you there when the adjuster came?

"A. Yes, sir.

"Q. When the fire took place, to whom did you give notice, if any one?

"A. To Mr. Fisher.

"Q. The agent of the defendant?

"A. Yes, sir.

"Q. Did the company send an adjuster down?

"A. Not right away; I suppose in a week or so; may be longer.

"Q. Did he make any investigation or examination there?

"A. Yes, sir.

"The COURT: Where is that drive way you were talking about here?"

"Mr. EWING: It don't appear on there."

"Why did you not put the elevated drive way on this plat?"

"A. Well, I was not asked to do that. I was asked to make a plat of the distance from the mill to the house and from the house to the lumber."

"Q. When did you first hear of any question being made about that elevated drive way?"

"A. About 45 or 50 days after the fix."

"(It is agreed that on November 1st, 1909, the defendant denied liability on the ground of a violation of the clear space clause, by a letter marked "Exhibit No. 1" to the testimony of Mr. Rife.)"

The corrections here made are in accordance with the original record on file in the office of the Clerk of the United States Court, at Memphis, Tennessee.

Sept. 17, 1914.

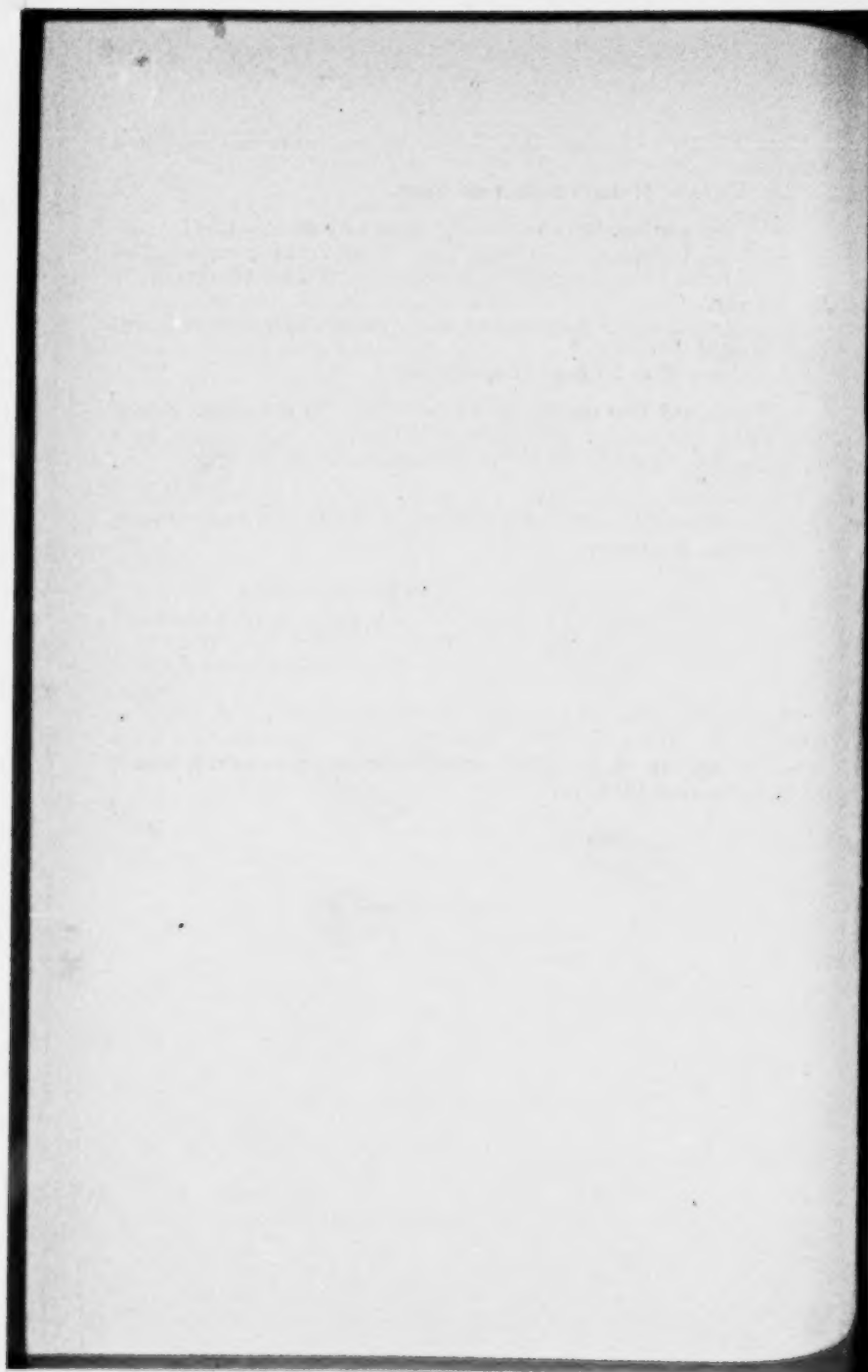
R. LEE BARTLE,

Attorney for Petitioners.

CARUTHERS EWING,

Attorney for Respondents.

[Endorsed:] File No. 23,964. Supreme Court U. S. October term, 1914. Term No. 279. Lumber Underwriters of New York et al., Petitioners, vs. O. C. Rife et al. Stipulation to amend record. Filed September 19, 1914.



Supreme Court of the United States, October Term, 1914.

No. 279.

LUMBER UNDERWRITERS OF NEW YORK et al., Petitioners,
vs.
O. C. RIFE et al., Respondents.

Additional Stipulation of Counsel with Respect to Misprints in the Record.

It is agreed by and between counsel representing all parties that the following omissions appear in the record as printed, with respect to the insurance policy in controversy, to-wit:

Exhibit, page 86 of printed record, policy of Lumber Underwriters, No. 27868, omits to state in the first paragraph thereof the date of the commencement of the risk,—the policy as printed reading:

"Know all men by these presents, That we, the undersigned individuals as separate underwriters * * *, do hereby insure Rife & Stutzman for the term of one year from the — day of May, 1909, at noon, to the 22nd day of May, 1910, at noon, etc."

whereas it should read:

"Know all men by these presents, That we, the undersigned individuals as separate underwriters * * *, do hereby insure Rife & Stutzman for the term of one year from the 22nd day of May, 1909, at noon, to the 22nd day of May, 1910, at noon, etc."

Said policy of insurance, as it appears in the printed record and at the conclusion thereof, reads:

"In witness whereof, The said underwriters have hereunto respectively subscribed their names and the several sums insured by them separately by their attorney-in-fact aforesaid, at the City of New York, this — day of —, 19—. (Then follows the names of the individual underwriters, and opposite each of the underwriters, with respect to the amount insured, the words, 'One-fifteenth of \$—. Total \$—.')"

and at the conclusion thereof the following appears in the record as printed:

"Not valid unless countersigned by D. A. Fisher, Agent.

"Countersigned at Memphis, Tennessee, this — day of —, 19—.

"D. A. FISHER, G. Agent."

whereas said record should read as follows:

"In witness whereof, The said underwriters have hereunto respectively subscribed their names and the several amounts insured

by them separately by their attorney-in-fact aforesaid, at the City of New York, this 27th day of May, 1909. (Then follow the names of the individual underwriters, and the amounts insured by each, to-wit, one-fifteenth of \$5,000.00. Total, \$5,000.00.)"

and the conclusion thereof should read:

"Not valid unless countersigned by D. A. Fisher, Agent.

"Countersigned at Memphis, Tennessee, this 27th day of May, 1909.

"D. A. FISHER, *G. Agent.*"

The corrections herein made are in accordance with the original policy and the record on file in the office of the Clerk of the United States Court at Memphis, Tennessee.

This 23d day of February, 1915.

R. LEE BARTELS,
Attorney for Petitioners.
CARUTHERS EWING,
Attorney for Respondents.

[Endorsed:] File No. 23,904. Supreme Court U. S., October term, 1914. Term No. 279. Lumber Underwriters of New York et al., Petitioners, vs. O. C. Rife et al. Additional stipulation of counsel as to misprints in transcript of record. Filed February 25, 1915.

279
No. ~~XXXX~~

Supreme Court
FILED
OCT 15 1913
JAMES H. McKEE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

LUMBER UNDERWRITERS, Petitioners,

vs.

O. C. RIFE, ET AL, Respondents.

Motion and Petition for Writ of Certiorari
and Brief in Support Thereof.

R. L. Bartels
H. D. Munnix

Attorneys for Petitioners.

1870-1871

1870-1871

1870-1871

1870-1871

1870-1871

1

6

3

0

1

2

1

1

5

0

1

1

**IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1913.**

LUMBER UNDERWRITERS, Petitioners.

vs.

O. C. RIFE ET AL., Respondents.

MOTION.

Come now the Lumber Underwriters—Fred R. Babcock and others—by R. L. Bartels, their counsel, and move this Honorable Court that it shall, by certiorari or other proper process, directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the respondents, O. C. Rife and others, were plaintiffs in error, and your petitioners, the Lumber Underwriters, defendants in error, and to that end it now tenders its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

R. L. Bartels
[Signature]
.....
Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1913.

LUMBER UNDERWRITERS, Petitioners.

vs.

O. C. RIFE ET AL., Respondents.

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United
States:

Your petitioners, the Lumber Underwriters of New
York, Fred R. Babcock and others, respectfully rep-
resent and show to this Honorable Court:

O. C. Rife and F. A. Stutzman, composing the firm
of Rife & Stutzman, filed their original bill in the
Chancery Court of Shelby County, Tennessee,
against the Lumber Underwriters of New York,
alleged to be "an insurance corporation or associa-
tion," seeking to recover \$7,000.00, claimed to be
due under two fire insurance policies. The case was
removed to the Federal Court at Memphis, the juris-
diction of which Court was based on diverse citizen-
ship of the parties.

Record 1-8.

In the United States Court the defendants, your
petitioners, filed a Special Appearance to question
the jurisdiction of the Court over its or their person.

Said Special Appearance set out specifically that the Lumber Underwriters of New York was a voluntary association, composed of fifteen individuals, Fred R. Babcock and others (naming them), all of whom, as shown, were citizens of States other than Tennessee or Mississippi—the original plaintiffs, O. C. Rife and F. A. Stutzman, being citizens of Tennessee and Mississippi, respectively. Record 9.

The statement as to one member's—Lewis Dill—residence, is a misprint, the original showing an allegation that he was a citizen and resident of Maryland, and a non-resident of Tennessee. (See opinion Court of Appeals, p. 2).

The trial resulted in a verdict in favor of the defendants, and judgment was entered thereon June 14, 1911. The verdict was the result of a peremptory instruction to the jury to find in favor of the defendants. Record 55; 93.

Prior to entering upon the trial, the original plaintiffs took a voluntary non-suit as to one of the insurance policies sued upon, to-wit, that known as No. 27979, for \$2,000.00. Record 54.

Upon the pleadings and bill of exceptions, duly settled, the case was taken by writ of error to the Circuit Court of Appeals for the Sixth Circuit, which Court, on April 11, 1913, reversed the trial court, and remanded the case for a new trial.

A petition for a rehearing was filed within the time required by the rules of the Court, and, on May 17, 1913, a rehearing was denied.

The original bill, as filed in the State court, proceeded upon the theory that as to the policy in controversy (the \$5,000.00 policy) the insured, Rife & Stutzman, had in fact maintained a clear space of one hundred feet between the saw mill (wood-working plant) and the lumber insured; and that there was no violation of the warranty requiring the assured to keep and maintain a "continuous clear space of one hundred feet * * * at all times * * * between the property * * * insured and any wood-working establishment."

Record 1-5.

After the removal, the plaintiffs, Rife & Stutzman, reformed their pleadings, so as to conform with a pleading at law, and the declaration was divided into two counts: One based upon the policy of insurance in controversy (\$5,000.00 policy, No. 27868); and the other based upon the \$2,000.00 policy, as to which a non-suit was subsequently taken. The allegations contained in the reformed pleadings were the same in substance as those contained in the original pleading—that is to say, it was averred that there was no violation of the clear space warranty requiring a clear space of one hundred feet between the lumber insured and the mill, but, *per contra*, that "the actual clearance was approximately one hundred forty-three feet;" and that the Insurer was not justified in refusing to pay upon the ground of a violation of the clear space warranty, because that warranty had not only been maintained, but the Insurer

knew that it had not been violated when it refused to pay. Record 37-40.

Certain preliminary motions, pleas in abatement, etc., were made by the defendants, all of which were overruled, and none of which are now material to be considered.

The defendants pleaded the general issue, and also made a special plea, averring a violation of the clear space warranty. At the instance of the plaintiffs, the special plea was struck out, upon the theory that a violation of such warranty could be shown under the general issue.

Record 48; 52.

No replication was filed to the pleas.

The warranty contained in the insurance policy, which the defendants claimed was violated, was as follows:

“Warranted by the assured that a continuous clear space of one hundred feet shall at all times be maintained between the property hereby insured and any wood-working or manufacturing establishment, * * * it being especially agreed and understood by the assured that any violation of this warranty shall render this policy null and void.”

Record 94.

The insurance policy also contained the following:

“This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no agent or other representa-

tive of the Underwriters shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of an agreement indorsed hereon or added hereto, and as to such provisions and conditions no agent or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

Record 94.

The undisputed evidence showed a violation of the above warranty at the time of the fire, September 19th—a lumber platform, a barn and an oil house then intervening between the lumber insured and the mill.

Record, Plats 66; 93;

Stutzman 84.

Plaintiffs—the Insured—sought to show that the requirement for the maintenance of one hundred feet of clear space had been waived by the insurer, and evidence for this purpose was sought to be introduced in various ways—i. e., by knowledge of both the agent and the principal, prior to issuing the policy, of the condition of the lumber yard, and the fact that one hundred feet of clear space was not then maintained.

In this connection, it was sought to show by one James R. Blair, who was the manager of the Gage Lumber Company—not a party to the record, and

not interested, but who had some lumber piled upon the Rife & Stutzman yard—that in 1909 (previous to the issuance of the policy in controversy) Mr. Fisher, the local agent at Memphis of the Insurers, had stated to him that the Company had sent an inspector to the property (lumber yard), who had examined it prior to the issuance of the policy in question, and that the inspector had sent his report of inspection to the company, showing the condition of the lumber yard at that time, and, inferentially, that the condition shown was that less than one hundred feet of clear space was then maintained between the lumber and the mill—Stutzman having previously testified that the condition relative to the location of the lumber and the distance between it and the mill, together with the intervening structures, were the same at the time of the fire as they were at the time when the inspector visited the premises.

Record 88; 81.

The evidence was objected to, and the evidence was not admitted, and error was assigned upon the action of the Court.

The Circuit Court of Appeals held that the evidence should have been admitted, upon the ground that the knowledge of the principal prior to the issuance of the contract is question, that a clear space of one hundred feet was not then being maintained between the lumber insured and the mill, by reason of the intervening structures—lumber platform, barn and oil house—followed by the issuance of the policy

is controversy, would "deny it from asserting the continued existence of those structures as a breach of the clear space warranty."

The Circuit Court of Appeals held that the agreement in the policy, that no waiver should be asserted, unless in writing, was not available to the principal, when the waiver involved consisted of knowledge of the principal prior to the issuance of the contract; but applied only when the waiver involved was some act or declaration or conduct of the agent; and in this regard held that the decision in the case of *Assurance Co. vs. Building Association*, 180 U. S., 308, and in the case of *Pennine vs. St. Paul Insurance Co.*, 218 U. S., 211, applied only to waivers based upon the act of the agent who issued the policy. (*Opinion, Circuit Court of Appeals*, p. 84.)

Conced for the insurers content:

(1) That the evidence was inadmissible under the elementary principle that prior oral agreements (knowledge being treated as an implied agreement), could not be permitted to contradict the plain, unambiguous terms of the contract.

(2) That the agreement of the parties contained in the insurance policy, that no waiver could or could be asserted against the insurer unless it was in writing, was a reasonable provision and one enforceable in the courts, and applied alike to waivers based upon the knowledge of the principal (deemed as an implied agreement), as well as to waivers based upon the knowledge of the agent.

(3) That the knowledge of the principal, prior to the issuance of the contract, of structures intervening between piles of lumber then upon the yard and the mill, so that at that time (prior to issuance of policy in controversy) one hundred feet of clear space was not maintained, could not affect the contract sued upon, subsequently made, and which provided that "a continuous clear space of one hundred feet shall at all times be maintained between the property insured (lumber) and the mill;" that this was a promissory warranty relating to the clear space to be maintained between the lumber and the mill, after the issuance of the policy in question, and without regard to conditions which existed prior to its issuance.

(4) That the plaintiffs' case was predicated in his pleadings upon a maintenance or non-violation of the clear space warranty; and that he could not, in this state of his pleadings, claim a waiver of that violation.

(5) That the method and manner by which it was sought to show knowledge on the part of the company was in the nature of hearsay testimony; that what Fisher, the agent, told Blair as to the company's having received, prior to the issuance of the contract in controversy, a plat made by its inspector, related to a past event, constituted no part of the *res gestae*, and was not an admission of the agent made in the course of his employment—such agent, Fisher, having nothing whatever to do with the making of the inspection.

(6) That a parol estoppel to insist upon the terms of the written contract could arise only by some act, conduct or declaration of the insurer **subsequent** to the issuance of the contract in controversy, as a result of which the insured was misled to his prejudice.

Other than the matter mentioned above, all assignments of error made by the plaintiffs in error were overruled by the Circuit Court of Appeals.

Your petitioners believe that the judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided. Particularly is this true in the case at bar, because the decision of the Court for the Sixth Circuit is at variance with the decision of the Court for the Eighth Circuit—Connecticut F. Ins. Co. vs. Buchanan, 141 Fed., 877—opinion by Mr. Justice Van Deventer, on the subject of estoppel as against an insurer by reason of the latter's knowledge—acquired prior to the issuance of the contract—^{a condition claimed as} of a violation of a provision or warranty in a subsequent contract; and is, as we understand it, at variance with the decisions of this Court on the same subject, to-wit, Carpenter vs. Insurance Co., 16 Peters 495, 512; Thompson vs. Insurance Co., 104 U. S., 252; and the late case of Penman vs. Insurance Co., 216 U. S., 311, as well as the earlier case

of Assurance Co. vs. Building Association, 183 U. S., 308.

Your petitioners have no right to an appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

Your petitioners present herewith as a part of this petition a brief, showing more fully their views upon the questions involved, and a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled O. C. Rife et al. vs. Lumber Underwriters, No. 2232, to the end that the said case may be reviewed and determined by this Court, as provided by law; that a stay of the proceedings in the District Court, upon the mandate of the Court of Appeals, be granted until the determination of this motion; and that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment of said Circuit Court of

Appeals in said case may be reversed by this Honorable Court.

And your petitioners will ever pray

R. L. Bartels
Saml. Hume

 Attorneys for Petitioners.

STATE OF TENNESSEE,

County of Shelby

ss.

R. L. Bartels, being duly sworn, says that he is one of the counsel for the Lumber Underwriters, the petitioners; that he prepared the foregoing petition; and that the allegations thereof are true as he verily believes.

R. L. Bartels

Subscribed and sworn to before me by R. L. Bar-

tels this, the *10*... day of *October*..., 1913.

H. H. Hummel

 Notary Public,

My commission expires on the... *17*... day of

Oct....., 19*15*-

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1913.

LUMBER UNDERWRITERS, Petitioners.

vs.

O. C. RIFE ET AL., Respondents.

BRIEF ON BEHALF OF LUMBER UNDER-
WRITERS IN SUPPORT OF THEIR PETI-
TION FOR A WRIT OF CERTIORARI.

(Fact that Circuit Court of Appeals has reversed and remanded case for a new trial will not preclude Court from granting writ. Penman vs. Ins. Co., 216 U. S., 311. Nor that mandate has gone down to court below. The Conqueror, 166 U. S., 110.)

The petition shows upon its face the material facts necessary to be considered in determining the questions of law involved. This brief, therefore, will deal only with the legal propositions referred to in the petition.

The main question to be considered, in a nutshell, is this:

Did knowledge on the part of the insurance company, prior to the issuance of the policy in controversy, that permanent structures intervened between the lumber ^{subsequently} insured and the mill (wood-working plant), resulting in a clear space of less than one hun-

dred feet, operate as an estoppel against the insurer insisting upon compliance by the insured with a written agreement, contained in a policy subsequently issued, to maintain a clear space of one hundred feet between the lumber then insured and the mill?

Or, to put it differently, so as to meet the exact case in controversy:

Can parol evidence be admitted to show knowledge on the part of the company, prior to the issuance of the contract sued upon, of structures intervening between the mill and piles of lumber then upon the yard, as a result of which, at that time (*prior to issuance of policy in controversy*) one hundred feet of clear space was not maintained—for the purpose of contradicting or affecting a policy subsequently issued, which provided that the insured should maintain a continuous clear space of one hundred feet at all times between the property insured (lumber) and the mill?

The Circuit Court of Appeals for the Sixth Circuit held that such evidence might be admitted, upon the theory of an estoppel, basing its holding upon the decisions of this Court of, *Insurance Co. vs. Wolf*, 95 U. S., 326, 330, and *Insurance Co. vs. Eggleston*, 96 U. S., 572, 577; and, seemingly, holding that the decision of this Court in *Assurance Co. vs. Building Association*, 183 U. S., 308, applied *only* to cases where it was sought to show by parol evidence that an agent, as distinguished from the principal or

company, had prior knowledge of conditions, contrary to and in conflict with the requirements of a subsequently issued policy.

A brief analysis of the opinion of the Circuit Court of Appeals for the Sixth Circuit will, we believe, show that the Court confused the principle of estoppel with the elementary rule prohibiting written contracts from being controlled by prior parol agreements or negotiations:

Recognizing the elementary principle or rule just referred to, that Honorable Court said that previous knowledge of the company of **lumber being piled** within one hundred feet of the mill would not estop the company from insisting upon a compliance with a warranty, contained in a subsequently issued policy, to maintain a clear space of one hundred feet. Proceeding in its opinion, that Honorable Court said: "On the other hand, the barn, the oil house and the lumber platform were more or less permanent in nature; and if defendant, with knowledge of their existence, and with reason to believe that their continued existence in their then locations, with respect to the mill and the lumber piles, was contemplated, elected to receive the premium and issue the policy, it would, we think, be estopped from asserting the continued existence of those structures as a breach of the clear space warranty."

The Honorable Circuit Court of Appeals thus makes a distinction between obstructions intervening between the insured property (lumber) and the

mill, which are of a permanent nature or character, and obstructions which are of a temporary nature or character; and the necessary conclusion from this distinction and its decision, is that the rule prohibiting prior parol evidence to contradict a subsequently written contract, applies in the one case, to-wit, temporary obstructions, and does not apply in the other case, to-wit, permanent obstructions. That when prior knowledge of conditions, permanent in their nature, is sought to be shown, for the purpose of controlling a subsequent written contract, evidence of such knowledge is admissible, on the theory of estoppel; but that when such knowledge relates to obstructions susceptible of being removed, it cannot be shown, because to admit it would violate the rule that prior parol agreements cannot control a subsequently executed written instrument.

The writer knows of no precedent or authority to support this distinction, and so far as appears from the opinion of the Circuit Court of Appeals there is none, unless it be the two cases of this Court referred to in their opinion, to-wit: Insurance Co. vs. Wolf, 95 U. S., 326; and Insurance Co. vs. Eggleston, 96 U. S., 572.

Would it not be a conclusive answer to the reasoning of the Honorable Circuit Court of Appeals to say that the insured property (lumber) might itself be moved, so as to overcome the objection made to the violation of the clear space by reason of the intervening structures, and thus the clear space re-

quired by the subsequently issued contract of insurance, be maintained?

Reference to the contract will show that there is nothing contained in it as to the exact place of location of the insured lumber. It could have been piled due south, east or west of the mill, without the structures referred to, or any other structures, intervening. (Record 67, Plat.)

The opinion of the Circuit Court of Appeals seems to be based upon the idea that the prior knowledge of the company as to the existence of the permanent structures, gave the company reason to believe that their continued existence at their then location, with respect to the mill and lumber piles (as then located), was contemplated.

How could such a belief arise in the mind of the insurer, or be presumed to have arisen, when at the time it issued its subsequent policy it said in effect, "From and after the date of this policy your lumber shall be piled so that one hundred feet of clear space shall exist between the lumber and the mill." This was put into writing, and agreed to by the insured when they accepted the policy. Surely any agreement to the contrary, whether express or implied, made prior to this written contract, became merged in the written contract.

The theory upon which "knowledge" is sought to be charged against the company as an estoppel, is that of an *implied* agreement, made prior to the written contract in question, that the insured might

maintain less than one hundred feet of clear space between the insured lumber and the mill. But for the sake of argument, let us assume that such an agreement had been *expressed* between the insured and the insurer prior to the written contract—oral evidence of this agreement could not be considered, in the face of the clear and unambiguous provision of the written contract subsequently made, that a failure to keep a clear space of one hundred feet between the lumber insured and the mill, should avoid the policy.

If, after the issuance of the policy in controversy, the company had made such an agreement with the insured, then the company might be estopped from insisting upon the condition (*Insurance Co. vs. Eggleston, supra*, and *Insurance Co. vs. Wolf, supra*), unless the agreement contained in the policy that no estoppel or waiver should arise, except it be by written instrument, would operate to prevent the estoppel.

But the mere knowledge of the insurer of the condition of the lumber yard, prior to issuing the policy, certainly could not have deceived or misled the insured, when subsequent to such knowledge, they and the insurer agreed in writing that, irrespective of such knowledge, the insured should maintain a clear space of one hundred feet. There was no act of the insurer subsequent to the delivery of the policy in question, prejudicial to the insured. There was nothing done that induced a change of position by the insured.

The insured had no right to rely upon the knowledge of the company, previously acquired, in the face of the contract subsequently made and delivered, that under the policy he was to comply with its conditions and actually maintain one hundred feet of clear space.

Insurance Co. vs. Thomas, 82 Fed., 408;
Kentucky Vermilion Co. vs. Insurance Co.,
146 Fed., 695.

In the first of the two cited cases the Court said:

"An intent to deceive cannot be inferred from the mere fact of knowledge, in the face of an express term of the contract made and delivered subsequent to such knowledge."

In the second of the two cited cases it was said:

"The plaintiff in error (insured) could not have been misled or deceived by any information or knowledge which the defendant in error (insurer) had as to the previous condition of the policy."

This Court has from the time of its institution down to the present, rendered decisions upholding the elementary rule inhibiting parol evidence from contradicting a subsequently issued written contract, not only with relation to and in suits upon insurance policies, but without a single exception, it has applied the rule in the face of objections made thereto, based upon a waiver or an estoppel.

Carpenter vs. Providence Washington Ins.
Co., 16 Peters, 495, 512;

Thompson vs. Insurance Co., 104 U. S., 252, 303;

Insurance Co. vs. Mowry, 96 U. S., 544.

Northern Assurance Co. vs. Building & Loan Ass'n, 183 U. S., 308;

Penman vs. St. Paul F. & M. Ins. Co., 216 U. S., 311.

It was said by opposing counsel in the Circuit Court of Appeals, and their view seems to have been shared by that court, that the Building and Loan Association case (183 U. S., 308) and the Penman case (216 U. S., 311) relate alone to an attempt to show knowledge on the part of an **agent**; and that the decisions therein announced would not and did not apply to an attempt to show prior knowledge on the part of the **principal**, in the face of a subsequent written contract, and for the purpose of controlling that contract.

While in those two cases the knowledge sought to be shown was that of an agent, the decisions in the two cases and the reasoning thereof are equally applicable to an effort to show by parol, prior knowledge on the part of a principal, for the purpose of controlling or affecting a subsequent written contract.

As to Assurance Co. vs. Building & Loan Association (*supra*), the Circuit Court of Appeals says that Mr. Justice Shiras, in enumerating the principles, made the basis of that decision, laid down the proposition (page 361), "that insurance companies may waive forfeitures * * *; that where waiver is relied

on the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition."

Unquestionably, an insurance company may waive forfeitures; but there is nothing in this decision or in any other decision of this Court which holds that such waiver may be shown by *parol* evidence of an agreement, express or implied, in conflict with a subsequent written contract.

The Northern Assurance Co. case reviewed the decisions in this country, both State and Federal, upon the subject under discussion, and quoted at length from those decisions to show, that a claim that evidence of prior knowledge could be shown by *parol*, in the face of a subsequent written contract, upon the theory of an estoppel, was a mere evasion of the rule. Referring to *Franklin Fire Insurance Co. vs. Martin*, 40 N. J. Law, 568, this Court quoted therefrom at length, the following being peculiarly pertinent to the proposition under discussion, and to the opinion of the Honorable Circuit Court of Appeals:

"It is manifest that the theory that such *parol* evidence, though it may not be competent to change the written contract, may be resorted to for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding *parol* testimony when offered to alter a written contract. A party suing on a contract in an action at law, must be conclusively presumed to be aware of what the contract contains, and the legal effect of this agreement is that its terms shall be complied with * * *.

"A policy of insurance is a contract in writing of such a nature as to be within the general rule of law, that a contract in writing cannot be varied or altered by parol testimony."

In the case of *Merchants Insurance Co. vs. Lyman*, 13 Wall., 668, the learned judge delivering the opinion made use of the following material language:

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party and accepted by the other, at the time the premium was paid, that neither party can afterwards vary that instrument as if no value is attaching what the contract was and agreed to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are dropped and excluded when the parties come to a written instrument as expressing the agreement."

In the case of *Thompson vs. Insurance Co.*, 118 U. S., 353, 355, it was sought to show that the company (as distinguished from its agent) had agreed that the policy should not become void on nonpayment of a premium note—both the policy and the premium note providing that it should become void upon non-payment of the note at maturity. In upholding the ruling of the trial court in refusing such evidence, the Court said:

"This supposed agreement is in direct conflict with the express terms of the policy and the note itself, and cannot affect them. . . . An insurance company may make a deviation or any

agree not to enforce a forfeiture; but a parol agreement made at the time of issuing a policy, contradicting the terms of the policy, itself, like any other parol agreement inconsistent with the written agreement, made contemporaneously therewith, is void and cannot be set up to contradict the writing. So in this case a parol agreement supposed to be made at the time of giving and accepting the premium note, cannot be set up to contradict the express terms of the note itself and the policy under which it was taken."

The case of *Carpenter vs. Insurance Co.*, 16 Peters, 495, 512, was a suit upon a contract of insurance, and it was sought to overcome the defense made—i. e., other insurance—by showing that the company (as distinguished from the agent) had notice, prior to the issuance of the policy in controversy, of the existence of the other insurance.

As in the case at bar, it was sought to introduce this evidence on the theory of a waiver; but this Court, speaking through Mr. Justice Story, held that it would violate the elementary rule, and could not be considered.

The case of *Connecticut Fire Ins. Co. vs. Buchanan*, 141 Fed., 877, opinion by Mr. Justice Van Deventer, reviews all of the decisions of this Court on the subject of admitting parol evidence for the purpose of contradicting the terms of a subsequent written policy, including the case of *Northern Assurance Co. vs. Building & Loan Ass'n* (*supra*). Mr. Justice Van Deventer treated all of the decisions re-

lating to prior knowledge on the part of the agent as equivalent to knowledge on the part of the principal, and concluded that irrespective of whether the prior knowledge was that of the agent or of the principal, in the absence of fraud, the unambiguous written contract must be permitted to speak for itself, and could not be altered or contradicted by prior parol testimony; "and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel in pais, is a mere evasion of the true rule, and wholly untenable." (P. 131.)

The two decisions upon which the Honorable Circuit Court of Appeals seems to rely to support their opinion, to-wit, *Insurance Co. vs. Wolf*, 95 U. S., 326, and *Insurance Co. vs. Eggleston*, 96 U. S., 572, are referred to, commented upon and distinguished in the *Northern Assurance Co. case* (*supra*); and in the case of *Connecticut Insurance Co. vs. Buchanan* (*supra*). Without undertaking to detail the distinctions there made, it will suffice to say that the acts and conduct of the insurer complained of in both the *Wolf* and the *Eggleston* cases, related to a time subsequent to the delivery of the written contract sued upon—to a course of dealing between the insurer and the insured subsequent to the delivery of the policy, under which the insurer permitted the payment of premiums after due date, and thus led the insured to believe that prompt payment was not required.

But in the case at bar that which is sought to operate as an estoppel relates to a matter, knowledge of which was acquired prior to the issuance of the policy in controversy, followed by a contract containing a provision directly in conflict with any agreement that might be inferred from such knowledge. And instead of the insured "necessarily" believing that compliance with the contract would not be insisted upon, the express terms of the contract are such that the insured must have "necessarily" believed that compliance was essential.

The contract is:

"Warranted by the insured that a continuous clear space of one hundred feet shall at all times be maintained (between ^{insured} lumber and mill) * * * it being expressly agreed and understood by the insured that a violation shall render the policy null and void."

2.

Effect of Former Policy.

It will probably be said that the present policy is a mere continuation of a former policy.

The policy in controversy is complete in all of its terms. It is a new, separate and independent contract from any former policy. The minds of the parties have met upon the terms of this contract. Their rights must be governed by those terms.

Kentucky Vermillion Co. vs. Insurance Co.,
146 Fed., 695, 700;

Brady vs. Northwestern Ins. Co., 11 Mich.,
425, 444.

In the first cited case, an effort was made to introduce oral testimony to show that the insurer had knowledge, during the life of a former policy, that the property insured (a manufacturing plant) was idle. This for the purpose of showing a waiver of a condition in a later policy requiring its operation. The Court, in holding that the conditions as they existed during the prior policy could not be considered, said:

"The second policy was not a mere continuation of the first, though in terms and conditions it was identical with the first, except as to dates. It was not in any manner dependent upon any acts or conduct of the parties under the first policy. The minds of the respective parties met upon the issuance of the policy by the insurance company and the payment of the premium by the insured. The second policy then became a new, separate and independent contract between the parties.

"In *Brady vs. Northwestern Insurance Co.*, 11 Mich., 425, 444, the Court said: 'We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and it was optional with both parties.'

* * * * *

"The second policy as delivered and accepted must therefore be presumed to express the entire contract between the parties. The rule is well settled that all parol negotiations, understandings and agreements are merged in the written contract." * * *

At the time the knowledge as to the intervening structures was acquired, the contract in question had not been made.

Estoppel cannot arise from a promise as to future action, with respect to a right to be acquired, upon an agreement not yet made.

Insurance Co. vs. Mowry, 96 U. S., 544.

In the opinion in the above case, it was said:

"The doctrine (estoppel) has no place for application, when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. * * * For compliance with arrangements, respecting future transactions, parties must provide by stipulation in their agreements, when reduced to writing."

II.

CHARACTER OF EVIDENCE OFFERED TO SHOW KNOWLEDGE.

Stutzman, one of the original plaintiffs, testified that in 1909, prior to the issuance of the policy in controversy, an inspector of the Lumber Underwriters visited his lumber yard and made a plat thereof, showing its then conditions, and that the conditions which existed at the time of the fire were the same as those which existed at the time of the inspection. (Record 81.)

Subsequently it was sought to show by one James R. Blair, the manager of the Gage Lumber Company,

which had some lumber upon the Rife & Stutzman yard, that Mr. Fisher, the local agent of the Lumber Underwriters at Memphis, had admitted to him that the company (Lumber Underwriters) had received the report of the inspector, showing the condition of the lumber yard, prior to the issuance of the policy in controversy.

Fisher was the agent at Memphis. He wrote the policy in question, and former policies. He had nothing to do with the inspection, and there was nothing in the record to show that it was a part of his duty; *per contra*, the evidence as offered by counsel for the insured was that the "Company had sent an inspector to the property." (Record 88.)

Making the inspection, therefore, was not within the scope of Fisher's employment or authority. A statement or declaration, therefore, made by Fisher as to what the inspector had done, or what his company had done, was a statement that did not relate to a matter within the scope of his employment.

But, assuming that he was authorized to make it, it related to a past event—i. e., an inspection already made and received by the company. Therefore, it was a matter that did not constitute a part of the *res gestae*, and hence not admissible as against the principal.

Railroad vs. O'Brien, 119 U. S., 99, 104-105.

In the above cited case, Mr. Justice Harlan, in considering when the statements of an agent are ad-

missible as against the principal (sought to be proved by the party to whom the agent made them), said:

"The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then pending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestae* that it is admissible at all; and therefore it is not necessary to call upon the agent to prove it; but wherever **what he did** is admissible in evidence, that is competent to prove what he said about the act **while he was doing it**.

* * * * *

"We are of opinion that the declaration of the engineer Herbert, to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. * * * It was in its essence the mere narration of a past occurrence, not a part of the *res gestae*, simply an assertion or representation in the course of conversation as to a matter not then pending, and in respect to which his authority as engineer had been fully asserted."

R. R. vs. O'Brien, 119 U. S., 99, 104-105.

Now, the matter sought to be proven by the witness Blair was a statement which Fisher, the agent, made to him, not about what he (Fisher) said about the act, **while he was doing it**. Fisher had nothing whatever to do with the act of making the inspection or sending it to the company. Any information or

knowledge that he obtained about it, therefore, must have been obtained *aliunde*, and hearsay. If competent at all, it could only have been proved by Fisher, not by one to whom he told it.

III.

NECESSITY FOR PLEADING WAIVER.

The theory of the declaration, both in its original state and as reformed in the United States Court, was that one hundred feet of clear space had been maintained by the insured between the mill and the lumber insured. There is nothing in the declaration to the effect that the company had knowledge of the intervening structures, and waived them. On the contrary, the declarations aver a compliance with the condition—i. e., the maintenance of the required clear space. This is evidenced from the following, taken from the declarations, to-wit:

“Defendant knew the exact conditions, and knew that while plaintiffs **had and maintained a clearance of one hundred feet or more**, that plaintiffs did not have a clearance of one hundred and fifty feet * * *. Plaintiffs aver that the actual clearance was one hundred forty-three feet.”
(Record 22-23; 38-39.)

The Circuit Court of Appeals said:

“We pass by without decision the question as to whether or not the alleged waiver was asserted in the declaration, as well as the question whether such assertion was necessary; for we

find nothing in the declaration inconsistent with the claim of such waiver, in case plaintiffs' contention there stated that a clear space of one hundred feet actually existed, should not be sustained; and the objection to the offered testimony did not clearly raise a question of pleading." (P. 6, Opinion.)

The general rule of law, as we understand it, requires the plaintiff who bases a recovery upon the ground of estoppel, to specially plead the facts on which estoppel is based. As it is put by Cyc.:

"Estoppel as an element of a cause of action, is not available unless specially pleaded."

Cyc., Vol. XVI, p. 808.

This is the rule in Tennessee.

Newport Cotton Mill Co. vs. Mims, 103 Tenn., 465;

Read vs. Street Ry., 110 Tenn., 316, 330.

Smith vs. Cross, 125 Tenn., 163, 176.

With relation to a waiver relied on to overcome a provision of an insurance contract, Cooley says:

"It is a general rule where pleadings contain allegations showing a forfeiture or avoidance of a policy, it is incumbent upon plaintiff to plead any waiver or estoppel on which he intends to rely."

Cooley's Briefs on Ins., Vol. III, 2768;

Battin vs. Insurance Co., 65 C. C. A., 358;

Mecca Ins. Co. vs. Moore, 128 S. W., 441;

McLeod vs. Travelers Ins. Co., 70 S. E., 157.

The defendant insurer pleaded a breach of the clear space warranty. (Record 48.)

This plea was struck out at the instance of the insured as irrelevant (Record 52), the theory of the planitiffs' counsel and of the Court being that the defense there specially pleaded was permissible under the general issue. Aside from that, the declaration on its face showed that the failure to pay was due to an alleged violation of the clear space warranty. So that the forfeiture of the contract because of such violation was clearly in issue, and clearly known to the plaintiff.

Under the rule announced above, the plaintiff should have averred facts tending to show waiver, either in the original declaration or by way of replication.

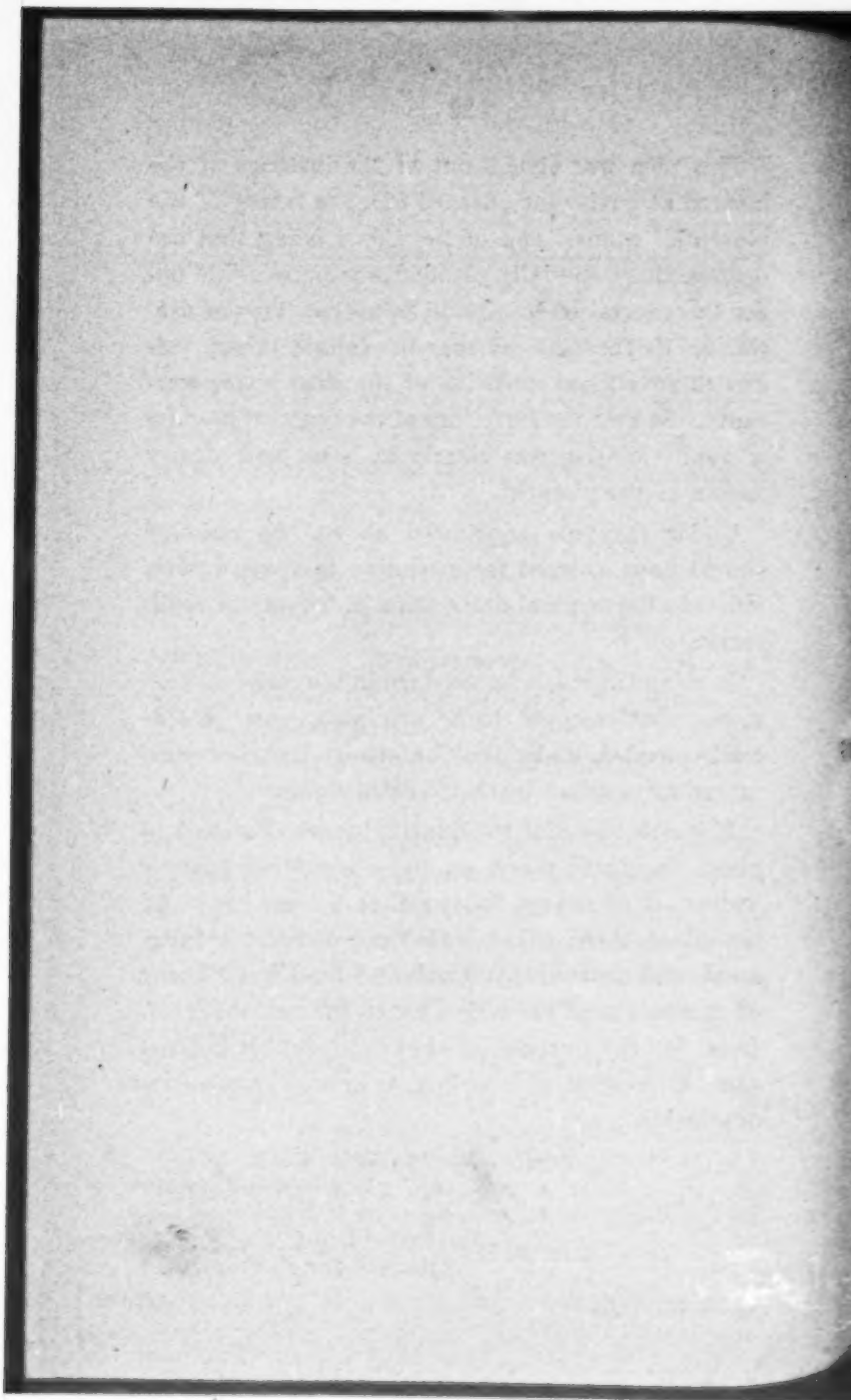
It being the rule of procedure in the State of Tennessee that estoppel, to be available, must be specially pleaded, under the Conformity Act, the same procedure applied in the Federal Court.

If it was essential to plaintiffs' cause of action to plead the facts relied on by way of estoppel or waiver, it of course follows that in case they did not plead them, proof would not support a judgment; and hence the conclusion of the Circuit Court of Appeals that the objection to the testimony offered for the purpose of showing estoppel did not raise a question of pleading, is in our opinion inapplicable.

Respectfully submitted

R. L. Bartels
John T. McLean

 Attorney for Petitioners.



United States Court, D. C.

FILED

NOV 27 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1914.

**LUMBER UNDERWRITERS OF NEW YORK
ET AL.,** Petitioners,

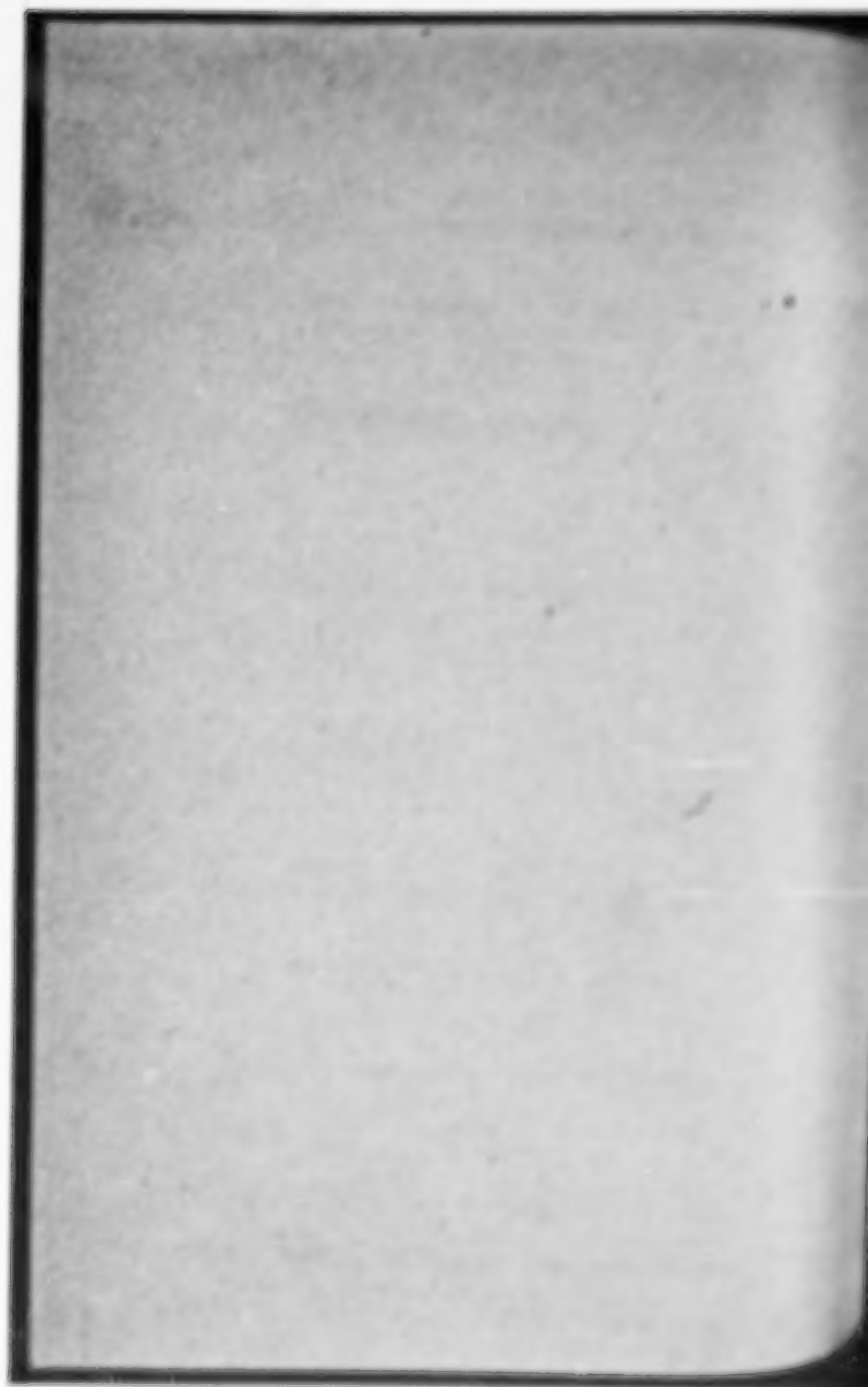
vs.

No. 279.

O. C. RIFE ET AL., Respondents.

**STATEMENT OF CASE, ASSIGNMENTS OF
ERROR, AND BRIEF, ON BEHALF OF
THE PETITIONERS.**

R. LEE BARTKIS,
Attorney.



SUBJECT INDEX—Continued

	Pages
Penman v. St. Paul F. & M. Ins. Co., 216 U. S., 311	17
Thompson v. Insurance Co., 104 U. S., 252, 303	17; 20
Distinguished.	
Insurance Co., v. Eggleston, 96 U. S., 572	15; 21-22
Insurance Co. v. Wolf, 95 U. S., 326	15; 21-22
Promissory Warranties, Doctrine of Estoppel Account of Prior Knowledge, Inapplicable	23
England v. Insurance Co., 81 Wis., 583	24-25
Insurance Co., v. Mowry, 96 U. S., 544	25-26
Keller v. Insurance Co., 27 Tex. Civ. Apps., 102	24
Kentucky Vermilion Co. v. Insurance Co., 146 Fed., 695	24
Shingle Co. v. Insurance Co., 91 Mich., 443	24; 25

TABLE OF CASES

Aetna Insurance Co. v. Moore, 231 U. S., 543	29
Battin v. Insurance Co., 65 C. C. A., 358	31
Carpenter v. Insurance Co., 16 Peters, 512	17, 20, 29
Connecticut F. Ins. Co. v. Buchanan, 141 Fed., 877	21
England v. Insurance Co., 81 Wis., 583	24
Franklin F. Ins. Co. v. Martin, 40 N. J. Law, 568	18-19
Hoffman v. Insurance Co., 119 N. Y. Supp., 978	31
Insurance Co. v. Eggleston, 96 U. S., 572	11, 13, 15, 21
Insurance Co. v. Mowry, 96 U. S., 544	17, 25
Insurance Co. v. Thomas, 82 Fed., 408	16
Insurance Co. v. Wolf, 95 U. S., 326	11, 13, 15, 21
Johnson v. Insurance Co., 119 Tenn., 599	27
Keller v. Insurance Co., 27 Tex. Civ. Apps., 102	24
Kentucky Vermilion Co. v. Ins. Co., 146 Fed., 695	16, 24
McLeod v. Insurance Co. (Ga.) 70 S. E., 157	31
Mecca Ins. Co. v. Moore (Tex.) 128 S. W., 441	31
Merchants Ins. Co. v. Lyman, 15 Wall., 664	19
Newport Cotton Mill Co. v. Mims, 103 Tenn., 465	31
Northern Assur. Co. v. Build. & L. Assn., 183 U. S., 208	7, 12, 17, 18, 29
Penman v. St. Paul Ins. Co., 216 U. S., 317	7, 17, 29
Railroad v. O'Brien, 119 U. S., 99, 104-105	28
Read v. Street Railway, 110 Tenn., 316, 330	31
Shingle Co. v. Insurance Co., 91 Mich., 443	24, 25
Smith v. Cross, 125 Tenn., 163, 176	31
Thompson v. Ins. Co., 104 U. S., 252, 303	17, 20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK
ET AL., Petitioners,

VS.

No. 279.

O. C. RIFE ET AL., Respondents.

STATEMENT OF CASE, ASSIGNMENTS OF
ERROR, AND BRIEF, ON BEHALF OF
THE PETITIONERS.

CASE STATED.

This case is pending in this Court pursuant to a writ of certiorari granted at the October term, 1913, addressed to the Circuit Court of Appeals for the Sixth Circuit.

It involves the liability of the Petitioners, as insurers, upon a contract of fire insurance in the New York Standard Form, with particular reference to the clear space warranty therein contained, reading as follows:

“Warranted by the assured that a continuous clear space of one hundred feet shall at all times

be maintained between the property hereby insured (lumber) and any wood-working or manufacturing establishment, dry kiln or forest * * * it being especially agreed and understood by the assured that any violation of this warranty shall render this policy null and void."

(Record 2.)

(86-87 Policy No. 27868.)

The suit was originally instituted in the Chancery Court of Shelby County, Tennessee, by O. C. Rife and F. A. Stutzman against the Petitioners, Lumber Underwriters of New York, alleged in the bill of complaint to be "an insurance corporation or association," seeking to recover upon two fire insurance policies, one for \$2,000.00, and the other for \$5,000.00.

(Record 1-4.)

The case was removed to the Federal Court at Memphis, the jurisdiction of which court was based upon the diverse citizenship of the parties.

(Record 6-7.)

Immediately after the removal the Petitioners filed a Special Appearance, questioning the jurisdiction of the court over their person.

Said Special Appearance averred that the lumber Underwriters of New York was not a corporation, but a voluntary association composed of fifteen individuals, Frederick R. Babcock and others (naming them), all of whom, as shown, were citizens of States other than Tennessee or Mississippi— the original

plaintiffs, O. C. Rife and F. A. Stutzman, being citizens of Tennessee and Mississippi, respectively.

(Record 9-10.)

(The statment as to the residence of one member of said association—Lewis Dill—contained in the record as originally printed, wherein it appears that he was a resident of Tennessee, is a misprint, it being in fact averred in the original pleading (Special Appearance) that he was a citizen and resident of Maryland, and a non-resident of Tennessee.—Appendix to printed record, Page 1, Opinion, Court of Appeals, Record 99.)

Alias writs were sued out for the purpose of obtaining service of process upon the petitioners, or their representative, and various and sundry proceedings, in the nature of preliminary motions, pleas, etc., were had, unnecessary now to be noticed, other than to say that the Petitioners pleaded a violation of the clear space warranty as a defense to the suit. No replication was filed by the plaintiffs.

(Record 46.)

The trial resulted in a verdict in favor of the Petitioners—this verdict being the result of a peremptory instruction to the jury to find in their favor.

(Record 53; 86.)

Prior to entering upon the trial in the lower court the plaintiffs took a voluntary non-suit as to one of the insurance policies sued upon, to-wit, the policy

for \$2,000.00, thus leaving involved in the controversy only the policy in the amount of \$5,000.00.

(Record 52.)

Upon the pleadings and bill of exceptions, duly settled, the Respondents sued out a writ of error to the Circuit Court of Appeals for the Sixth Circuit, and therein assigned errors.

(Record 91.)

The Court of Appeals reversed the trial court, and remanded the case for a new trial, the basis of its decision being set out with particularity hereafter.

(Record 97.)

The Petitioners presented to this Court their petition for a writ of certiorari on October 15, 1913, for the purpose of having the decision of the Circuit Court of Appeals reviewed, and this petition was shortly thereafter granted by this Court.

(Record 113-114.)

The original pleading of the Insured proceeded upon the theory that as to the policy in controversy the clear space required thereunder of one hundred feet had in fact been maintained between the sawmill (the wood-working plant) and the lumber insured; and it was averred that "the actual clearance was approximately 143 feet."

(Record 4.)

After the removal, the reformed pleadings contained similar averments.

(Record 21-22.)

In addition to the warranty with respect to the maintenance of a clear space of one hundred feet be-

tween the lumber insured and the mill, the policy in controversy contained the following:

“This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no agent or other representative of the Underwriters shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of an agreement indorsed hereon or added hereto, and as to such provisions and conditions no agent or representative, shall have power or be deemed or held to have waived such provision or conditions, written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.” (Record 86-87; Policy.)

The undisputed evidence showed a violation of the clear space warranty at the time of the fire—a lumber platform, a barn and an oil house intervening between the lumber insured and the mill

(Plats, Record 70-71; 84-85.)

(Plat, Record 62.)

(Tes. Stutzman, Record 73-74; 78-79.)

The original plaintiffs, the Insured, sought to show that the requirement of the maintenance of one hundred feet of clear space had been waived by the Insurer, and for this purpose it was sought to introduce evidence to show knowledge on the part of both the agent issuing the policy and the Underwriters, prior

to its issuance, with respect to the condition of the lumber yard, and the fact that the clear space required, one hundred feet, was not then maintained.

In this connection it was sought to show by one James R. Blair, who was the Manager of the Gage-Lumber Company—not a party to the record and not interested, but who had some lumber piled upon the Rife & Stutzman yard—that in 1909 and previous to the issuance of the policy in controversy, the local agent of the Insurers at Memphis, D. A. Fisher by name, had stated to him that the company had sent an inspector to the lumber yard, who had examined it prior to the issuance of the policy in question, and that the inspector had sent his report of inspection to the company, showing the condition of the lumber yard at that time; and, inferentially, that the condition shown was that less than one hundred feet of clear space was then maintained between the lumber and the mill—one of the insured having testified that the condition of the mill, the location of the lumber, and the distance between it and the mill, together with the intervening structures, were the same at the time of the fire as they were at the time when the inspector visited the premises.

(Record 80-82; 76.)

This evidence was objected to, the objection sustained, and error was assigned in the Circuit Court of Appeals upon this action of the trial court.

(Record 82.)

The Circuit Court of Appeals held that the evidence should have been admitted, upon the ground that the knowledge of the principal, prior to the issuance of the contract in question, that a clear space of one hundred feet was not then being maintained between the lumber insured and the mill, by reason of the intervening structures—lumber platform, barn and oilhouse—followed by the issuance of the policy in controversy, would “estop it from asserting the continued existence of those structures as a breach of the clear space warranty.”

The Court of Appeals further held that the agreement in the policy that no waiver should be asserted by the assured unless in writing, was not available to the company, when the waiver invoked consisted of knowledge of the principal (company) prior to the issuance of the contract; but applied only when the waiver invoked was some act, declaration or conduct of the agent—treating the decisions of this Court in the cases of Assurance Company vs. Building & Loan Association, 183 U. S., 308, and Penman vs. St. Paul Fire & Marine Insurance Co., 216 U. S., 311, as applicable only to waivers based upon the act or knowledge of the agent issuing the policy as contra-distinguished from the act or knowledge of the principal.

Opinion, Cir. Ct. of Apps., Record 100-102.

All other assignments of error made in the Court of Appeals were overruled by that Court—the holding above mentioned being the sole basis of the de-

cision of the Court of Appeals in reversing and remanding the case for a new trial.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Sixth Circuit erred in reversing and remanding the case for a new trial; and in holding that the trial court should have admitted the evidence of the said James R. Blair, tending to show knowledge on the part of the Company, prior to the issuance of the contract in controversy, with respect to the condition of the lumber yard and the structures thereon intervening between the lumber insured and the mill, for the purpose of showing a waiver of the requirement to maintain one hundred feet of clear space—in effect, holding that such knowledge would operate to estop the insurer from insisting upon a compliance with the clear space warranty contained in the policy subsequently issued.

(1) Such evidence was inadmissible, under the elementary principle that prior oral agreements (knowledge being treated as an implied agreement) could not be permitted to contradict the plain, unambiguous terms of the contract.—Post. 10

(2) The agreement of the parties contained in the insurance policy that no waiver could or would be invoked against the insurer, with respect to a

condition or provision of the written contract, unless it was evidenced by some writing, was a reasonable provision and one enforceable in the courts, and applied alike to a waiver based upon the knowledge of the principal (claimed as an implied agreement), as well as to a waiver based upon the knowledge of an agent.—Post. 29

(3) The knowledge of the Company, prior to the issuance of the contract, of structures intervening between piles of lumber then upon the yard and the mill, so that at that time (prior to the issuance of the policy in controversy) one hundred feet of clear space was not maintained, could not affect the contract sued upon, subsequently made, and which provided that "a continuous clear space of one hundred feet shall at all times be maintained between the property insured (lumber) and the mill"—this being a promissory warranty relating to the clear space to be maintained between the lumber and the mill, after the issuance of the policy in question and without regard to conditions which existed prior to its issuance.—Post. 23

(4) The plaintiff's case was predicated in his pleadings upon a compliance with and a maintenance of the clear space warranty contained in the policy—one hundred feet clearance. They could not in this state of their pleadings claim a waiver of the violation of such warranty.—Post. 29

(5) The method and manner by which it was sought to show knowledge on the part of the Com-

pany was in the nature of hearsay testimony. What Fisher, the agent, told Blair as to the Company having received a plat made by its inspector related to a past event, constituted no part of the *res gestae*, and was not an admission of the agent made in the course of his employment—the agent, Fisher, having nothing whatever to do with the making of such inspection.—Post. 26

(6) A parol estoppel to insist upon the terms of a written contract can arise only by some act, conduct or declaration of the insurer subsequent to the issuance of the contract, as a result of which the insured was misled to his prejudice.—Post.

BRIEF AND ARGUMENT.

I.

Admission of Parol Evidence to Vary Terms of a Prior Written Contract Upon Theory of Estoppel, Is an Evasion of the True Rule.

The questions involved in this controversy, to be presented to this Court, are purely questions of law arising upon undisputed facts.

The main question to be considered, in a nutshell, is this:

Did knowledge on the part of the insurance company, prior to the issuance of the policy in contro-

versy, that permanent structures intervened between the lumber insured and the mill (wood-working plant), resulting in a clear space of less than one hundred feet, operate as an estoppel against the insurer insisting upon compliance by the insured with a written agreement, contained in a policy **subsequently** issued, to maintain a clear space of one hundred feet between the lumber then insured and the mill?

Or, to put it differently, so as to meet the exact case in controversy:

Can parol evidence be admitted to show knowledge on the part of the company, prior to the issuance of the contract sued upon, of structures intervening between the mill and piles of lumber then upon the yard, as a result of which, at that time (**prior to issuance of policy in controversy**) one hundred feet of clear space was not maintained—for the purpose of contradicting or affecting a policy **subsequently** issued, which provided that the insured should maintain a continuous clear space of one hundred feet at all times between the property insured (lumber) and the mill?

The Circuit Court of Appeals for the Sixth Circuit held that such evidence might be admitted, upon the theory of an estoppel, basing its holding upon the decisions of this Court of, *Insurance Co. vs. Wolf*, 95 U. S., 326, 330, and *Insurance Co. vs. Eggleston*, 96 U. S., 572, 577; and, seemingly, holding that the de-

dictum of the Court in *Amusement Co. vs. Building Association*, 165 U. S., 308, applied *only* to cases where it was sought to show by *parol* evidence that an agent, as distinguished from the principal or company, had prior knowledge of conditions, contrary to and in conflict with the requirements of a subsequently issued policy.

A brief analysis of the opinion of the Circuit Court of Appeals for the Sixth Circuit will, we believe, show that the Court confused the principle of estoppel with the elementary rule prohibiting written contracts from being controlled by prior *parol* agreements or negotiations.

Recognizing the elementary principle or rule just referred to, that Honorable Court said that previous knowledge of the company of lumber being piled within one hundred feet of the mill would not estop the company from insisting upon a compliance with a warranty, contained in a subsequently issued policy to maintain a clear space of one hundred feet. Proceeding in its opinion, that Honorable Court said: "On the other hand, the logs, the oil house and the lumber platform were more or less permanent in nature; and if defendant, with knowledge of their existence, and with reason to believe that their continued existence in their then location, with respect to the mill and the lumber pile, was contemplated, elected to receive the premium and issue the policy, it would, we think, be estopped from

meeting the continued existence of things does not turn on a breach of the due care necessary.¹

The Honorable Circuit Court of Appeals has made a distinction between distractions intervening between the insured property (insured) and the will, which are of a permanent nature as character, and distractions which are of a temporary nature as character, and the necessary conclusion from this distinction and its holding, is that the rule prohibiting prior paid evidence to contradict a subsequently written contract, applies in the one case, to wit, temporary distractions, and does not apply in the other case, to wit, permanent distractions. That where prior knowledge of conditions, upon which a valid action is sought to be done, for the purpose of controlling a subsequently written contract, evidence of such knowledge is admissible, on the theory of estoppel; but that where such knowledge relates to distractions susceptible of being removed, it cannot be shown, because to admit it would violate the rule that prior paid agreements cannot control a subsequently executed written instrument.

The writer boasts of no precedent or authority to support this distinction, and as far as appears from the opinion of the Circuit Court of Appeals there is none, unless it is the one case of the Court referred to in their opinion, to wit, *Reveries Co. vs. Wolf*, 38 U. S. 336, and *Reveries Co. vs. Spillman*, 38 U. S. 375, commented upon hereafter.

Would it not be a conclusive answer to the reasoning of the Honorable Circuit Court of Appeals to say that the insured property (lumber) might itself be moved, so as to overcome the objection made to the violation of the clear space by reason of the intervening structures, and thus the clear space required by the subsequently issued contract of insurance, be maintained?

Reference to the contract will show that there is nothing contained in it as to the exact place of location of the insured lumber. It could have been piled due south, east or west of the mill, without the structures referred to, or any other structures, intervening.

(Record 62, Plat.)

The opinion of the Circuit Court of Appeals seems to be based upon the idea that the prior knowledge of the company as to the existence of the permanent structures would give the company reason to believe that their continued existence at their then location, with respect to the mill and lumber piles (as then located), was contemplated.

How could such a belief arise in the mind of the insurer, or be presumed to have arisen, when at the time it issued its subsequent policy it said in effect, "From and after the date of this policy your lumber shall be piled so that one hundred feet of clear space shall exist between the lumber and the mill." This was put into writing, and agreed to by the insured when they accepted the policy. Surely any agree-

ment to the contrary, whether express or implied, made prior to this written contract, became merged in the written contract.

The theory upon which "knowledge" is sought to be charged against the company as an estoppel, is that of an **implied** agreement, made prior to the written contract in question, that the insured might maintain less than one hundred feet of clear space between the insured lumber and the mill. But for the sake of argument, let us assume that such an agreement had been **expressed** between the insured and the insurer prior to the written contract—oral evidence of this agreement could not be considered, in the face of the clear and unambiguous provision of the written contract subsequently made, that a failure to keep a clear space of one hundred feet between the lumber insured and the mill, should avoid the policy.

If, after the issuance of the policy in controversy, the company had made such an agreement with the insured, then the company might be estopped from insisting upon the condition (*Insurance Co. vs. Eggleston, supra*, and *Insurance Co. vs. Wolf, supra*), unless the agreement contained in the policy that no estoppel or waiver should arise, except it be by written instrument, would operate to prevent the estoppel.

But the mere knowledge of the insurer of the condition of the lumber yard, prior to issuing the policy,

certainly could not have deceived or misled the insured, when subsequent to such knowledge, they and the insurer agreed in writing that, irrespective of such knowledge, the insured should maintain a clear space of one hundred feet. There was no act of the insurer subsequent to the delivery of the policy in question, prejudicial to the insured. There was nothing done that induced a change of position by the insured.

The insured had no right to rely upon the knowledge of the company, previously acquired, in the face of the contract subsequently made and delivered, that under the policy he was to comply with its conditions and actually maintain one hundred feet of clear space.

Insurance Co. vs. Thomas, 82 Fed., 408;
Kentucky Vermilion Co. vs. Insurance Co.,
146 Fed., 695.

In the first of the two cited cases the Court said:

"An intent to deceive cannot be inferred from the mere fact of knowledge, in the face of an express term of the contract made and delivered subsequent to such knowledge."

In the second of the two cited cases it was said:

"The plaintiff in error (insured) could not have been misled or deceived by any information or knowledge which the defendant in error (insurer) had as to the previous condition of the policy."

This Court has from the time of its institution down to the present, rendered decisions upholding the elementary rule inhibiting parol evidence from contradicting a subsequently issued written contract, not only with relation to and in suits upon insurance policies, but without a single exception, it has applied the rule in the face of objections made thereto, based upon a waiver or an estoppel.

Carpenter vs. Providence Washington Ins. Co., 16 Peters, 495, 512;

Thompson vs. Insurance Co., 104 U. S., 252, 303;

Insurance Co. vs. Mowry, 96 U. S., 544.

Northern Assurance Co. vs. Building & Loan Ass'n, 183 U. S., 308;

Penman vs. St. Paul F. & M. Ins. Co., 216 U. S., 311.

It was said by opposing counsel in the Circuit Court of Appeals, and their view seems to have been shared by that court, that the Building and Loan Association case (183 U. S., 308) and the Penman case (216 U. S., 311) relate alone to an attempt to show knowledge on the part of an **agent**; and that the decisions therein announced would not and did not apply to an attempt to show prior knowledge on the part of the **principal**, in the face of a subsequent written contract, and for the purpose of controlling that contract.

While in those two cases the knowledge sought to be shown was that of an agent, the decisions in

the two cases and the reasoning thereof are equally applicable to an effort to show by parol, prior knowledge on the part of a principal, for the purpose of controlling or affecting a subsequent written contract.

As to Assurance Co. vs. Building & Loan Association (*supra*), the Circuit Court of Appeals says that Mr. Justice Shiras, in enumerating the principles, made the basis of that decision, laid down the proposition, page (361), "that insurance companies may waive forfeitures * * *; that where waiver is relied on the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition."

Unquestionably, an insurance company may waive forfeitures; but there is nothing in this decision or in any other decision of this Court which holds that such waiver may be shown by parol evidence of an agreement, express or implied, in conflict with a subsequent written contract.

The Northern Assurance Co. case reviewed the decisions in this country, both State and Federal, upon the subject under discussion, and quoted at length from those decisions to show, that a claim that evidence of prior knowledge could be shown by parol, in the face of a subsequent written contract, upon the theory of an estoppel, was a **mere evasion** of the rule. Referring to Franklin Fire Insurance Co. vs. Martin, 40 N. J. Law, 568, this Court quoted there-

from at length, the following being peculiarly pertinent to the proposition under discussion, and to the opinion of the Honorable Circuit Court of Appeals:

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law, must be conclusively presumed to be aware of what the contract contains, and the legal effect of this agreement is that its terms shall be complied with * * *.

"A policy of insurance is a contract in writing of such a nature as to be within the general rule of law, that a contract in writing cannot be varied or altered by parol testimony."

In the case of Merchants Insurance Co. vs. Lyman, 15 Wall, 664, the learned judge delivering the opinion made use of the following material language:

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party and accepted by the other, at the time the premium was paid, that neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement."

In the case of *Thompson vs. Insurance Co.*, 104 U. S., 252, 303, it was sought to show that the company (as distinguished from the agent) had agreed that the policy should not become void on non-payment of a premium note—both the policy and the premium note providing that it should become void upon non-payment of the note at maturity. In upholding the ruling of the trial court in refusing such evidence, this Court said:

“This supposed agreement is in direct conflict with the express terms of the policy and the note itself, and cannot affect them. * * * An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with the written agreement made contemporaneously therewith, is void and cannot be set up to contradict the writing. So in this case a parol agreement supposed to be made at the time of giving and accepting the premium note, cannot be set up to contradict the express terms of the note itself and the policy under which it was taken.”

The case of *Carpenter vs. Insurance Co.*, 16 Peters, 495, 512, was a suit upon a contract of insurance, and it was sought to overcome the defense made—i. e., other insurance—by showing that the company (as distinguished from the agent) had notice, prior to the issuance of the policy in controversy, of the existence of the other insurance.

As in the case at bar, it was sought to introduce this evidence on the theory of a waiver; but this Court, speaking through Mr. Justice Story, held that it would violate the elementary rule, and could not be considered.

The case of Connecticut Fire Ins. Co. vs. Buchanan, 141 Fed., 877, opinion by Mr. Justice Van Deventer, reviews all of the decisions of this Court on the subject of admitting parol evidence for the purpose of contradicting the terms of a subsequent written policy, including the case of Northern Assurance Co. vs. Building & Loan Ass'n (supra). Mr. Justice Van Deventer treated all of the decisions relating to prior knowledge on the part of the agent as equivalent to knowledge on the part of the principal, and concluded that irrespective of whether the prior knowledge was that of the agent or of the principal, in the absence of fraud, the unambiguous written contract must be permitted to speak for itself, and could not be altered or contradicted by prior parol testimony; **"and that the theory that such testimony, although not competent to alter or contradict the contract, may yet be received for the purpose of raising an estoppel in pais, as a mere evasion of the true rule, and wholly untenable."**

(P. 131.)

The two decisions upon which the Honorable Circuit Court of Appeals seems to rely to support their opinion, to-wit, Insurance Co. vs. Wolf, 95 U. S., 326, and Insurance Co. vs. Eggleston, 96 U. S., 572, are referred to, commented upon and distinguished in

the Northern Assurance Co. case (supra); and in the case of Connecticut Insurance Co. vs. Buchanan (supra). Without undertaking to detail the distinctions there made, it will suffice to say that the acts and conduct of the insurer complained of in both the Wolf and the Eggleston cases, related to a time subsequent to the delivery of the written contract sued upon—to a course of dealing between the insurer and the insured subsequent to the delivery of the policy, under which the insurer permitted the payment of premiums after due date, and thus led the insured to believe that prompt payment was not required.

But in the case at bar that which is sought to operate as an estoppel relates to a matter, knowledge of which was acquired prior to the issuance of the policy in controversy, followed by a contract containing a provision directly in conflict with any agreement that might be inferred from such knowledge. And instead of the insured "necessarily" believing that compliance with the contract would not be insisted upon, the express terms of the contract are such that the insured must have "necessarily" believed that compliance was essential.

The contract is:

"Warranted by the **insured** that a **continuous** clear space of one hundred feet shall **at all times** be maintained (between lumber and mill) * * * it being expressly **agreed and understood by the insured** that a violation shall render the policy null and void."

II.

Doctrine of Estoppel Based Upon Knowledge of Conditions Prior to Issuance of Policy, Not Applicable to Requirements to Be Performed After Delivery,—Future Acts or Promissory Warranties.

The clear space warranty provided that the assured should maintain "a **continuous** clear space of one hundred feet **at all times**" between the property insured and the mill. (Record 86-87, Policy.)

This warranty is clearly a continuing or promissory warranty. It relates not only to the clear space to be maintained at the time of the issuance of the policy, but also relates to the clear space that should be maintained "at all times" during the life of the policy. Relating to conditions that were agreed should be maintained in the future and subsequent to the delivery and issuance of the contract, the warranty is one *in futuro*.

Cooley's Insurance Briefs, Vol. 2, 1466.

Being a promissory warranty, the insurer had a right to provide for such amount of clear space as it desired, and if the policy was accepted by the insured, the latter was bound to comply with the agreement.

Though the insurer knew that at the time of the issuance of the contract the clear space therein provided for was not being maintained, nevertheless, he had the right to presume that the insured by accepting the policy containing a requirement for a greater

amount of clear space, would comply with the policy provision, and thereafter maintain the amount of clear space contracted for.

Keller vs. Insurance Co., 27 Tex. Civ. Apps., 102.

England vs. Ins. Co., 81 Wis. 583.

Ky. Vermilion Co. vs. Norwich Union Ins. Co., 77 C. C. A. 121; s. c. 146 Fed., 695.

Shingle Co. vs. Ins. Co., 91 Mich. 443.

In the case of Ky. Vermilion Co. vs. Norwich Union (*supra*), it was held that knowledge by the insurer, i. e., "**company or its officers**," at the time of the issuance of the policy, as to the status of the property insured, to-wit, that it was then idle and inoperative, could not be considered in evidence, where the policy provided for an agreement on the part of the insured to the effect that if the plant should remain idle for a period of thirty days, the contract would become terminated.

This was treated as a promissory warranty, imposing upon the insured the duty of seeing that during the life of the policy, the property did not remain idle for a period of thirty days at any one time.

In the case of England vs. Ins. Co., 81 Wis., 583, the policy contained a provision that, "if the premises be or become vacant and so remain for ten days, the policy is to be void." It was held:

That if the company had knowledge of a vacancy which existed at the time the policy issued, its consent to a continuance of such vacancy could not be

implied therefrom; nor could it on that ground be charged with notice of such continuance, or be held to have waived the condition of the policy. The court said:

“* * * It cannot be successfully maintained that conceding that knowledge of vacancy (at issuance of policy) is to be imputed to the insurer, there is any implied consent to the continuance of such condition of the premises, or that the insurer is thereby affected with notice that they so continued vacant contrary to the express continuing warranty contained in the policy” (P. 589).

The Michigan court, in the above cited case, 91 Mich., 443, relative to a clear space warranty, said:

“The warranty is one *in futuro* and it is of no consequence whether defendant's agents knew at the time of the issuance of the policy that plaintiff had shingles piled within 25 feet of the mill. * * * Parol evidence is incompetent to change the terms of the contract.”

At the time the knowledge as to the intervening structures is claimed to have been acquired, the contract in question had not been made.

Estoppel cannot arise from a promise as to future action, with respect to a right to be acquired, upon an agreement not yet made.

Insurance Co. vs. Mowry, 96 U. S., 544.

In the opinion in the above case, it was said:

“The doctrine (estoppel) has no place for application, when the statement relates to rights

depending upon contracts yet to be made, to which the person complaining is to be a party.
* * * For compliance with arrangements, respecting future transactions, parties must provide by stipulation in their agreements, when reduced to writing."

So, in view of the above authorities, it is submitted that any notice or knowledge which the company, itself, had of conditions which existed on the lumber yard of the insured prior to the issuance of the contract in question, could in no sense be treated as an estoppel or waiver as against its right to insist upon a compliance with the clear space warranty relating to the future use and occupation of the lumber yard.

III.

Character of Evidence Offered to Show Knowledge, Mere Hearsay.

Stutzman, one of the original plaintiffs, testified that in 1909, prior to the issuance of the policy in controversy, an inspector of the Lumber Underwriters, visited his lumber yard and made a plat thereof, showing its then conditions, and that the conditions which existed at the time of the fire were the same as those which existed at the time of the inspection.

(Record 76.)

Subsequently it was sought to show by one James R. Blair, the manager of the Gage Lumber Company, which had some lumber upon the Rife & Stutzman yard, that Mr. Fisher, the local agent of the Lumber

Underwriters at Memphis, had admitted to him that the company (Lumber Underwriters) had received the report of the inspector, showing the condition of the lumber yard, prior to the issuance of the policy in controversy. (Record 81-82.)

Fisher was the agent at Memphis. He wrote the policy in question, and former policies. He had nothing to do with the inspection, and there was nothing in the record to show that it was a part of his duty; *per contra*, the evidence as offered by counsel for the insured was that the "Company had sent an inspector to the property."

Making the inspection, therefore, was not within the scope of Fisher's employment or authority. A statement or declaration, therefore, made by Fisher as to what the inspector had done, or what his company had done, was a statement that did not relate to a matter within the scope of his employment.

But, assuming that he was authorized to make it, it related to a past event—i. e., an inspection already made, and received by the company. Therefore, it was a matter that did not constitute a part of the *res gestae*, and hence not admissible as against the principal.

Railroad vs. O'Brien, 119 U. S., 99, 104-105.
Johnson vs. Ins. Co., 119 Tenn., 599.

In the above cited case of R. R. vs. O'Brien, Mr. Justice Harlan, in considering when the statements of an agent are admissible as against the principal

(sought to be proved by the party to whom the agent made them), said:

"The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then pending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestae* that it is admissible at all; and therefore it is not necessary to call upon the agent to prove it; but wherever **what he did is** admissible in evidence, that is competent to prove what he said about the act **while he was doing it**.

* * * * *

"We are of opinion that the declaration of the engineer Herbert, to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. * * * It was in its essence the mere narration of a past occurrence, not a part of the *res gestae*, simply an assertion or representation in the course of conversation as to a matter not then pending, and in respect to which his authority as engineer had been fully asserted."

R. R. vs. O'Brien, 119 U. S., 99, 104-105.

Now, the matter sought to be proven by the witness Blair was a statement which Fisher, the agent, made to him, not about what he (Fisher) said about the act, **while he was doing it**. Fisher had nothing whatever to do with the act of making the inspection or sending it to the company. Any information or knowledge that he obtained about it, therefore, must

have been obtained *aliunde*, and hearsay. If competent at all, it could only have been proved by Fisher, not by one to whom he told it.

IV.

Agreement That No Waiver Would Be Insisted Upon Unless Evidenced by Some Writing.

The contract of insurance contained the usual provision with respect to waivers, commonly known as the Non-Waiver Clause.

It is expressly provided therein that no provision thereof shall be deemed waived, unless such waiver be in writing, and that "**no privilege or permission affecting the insurance shall exist or be claimed by the insured unless in writing.**"

(Record 86-87.)

This is a reasonable provision, and one enforceable in the courts. It is a valid contract and has so been held by this Court, applicable alike to waivers claimed by the insured to have been made by the principal or company, as well as to waivers claimed to have been made by an agent.

Carpenter vs. Insurance Co., 16 Peters, 512.

Northern Assurance Co. vs. Building & Loan Ass'n, 183 U. S., 308.

Penman vs. St. Paul Insurance Co., 216 U. S., 317.

Aetna Ins. Co. vs. Moore, ²³¹U. S., ~~543~~

V.

Necessity for Pleading Waiver.

The theory of the declaration, both in its original state and as reformed in the United States Court,

was that one hundred feet of clear space had been maintained by the insured between the mill and the lumber insured. There is nothing in the declaration to the effect that the company had knowledge of the intervening structures, and waived them. On the contrary, the declarations aver a compliance with the condition—i. e., the maintenance of the required clear space. This is evidenced from the following, taken from the declarations, to-wit:

“Defendant knew the exact conditions, and knew that while plaintiffs had and maintained a clearance of one hundred feet or more, that plaintiffs did not have a clearance of one hundred and fifty feet * * *. Plaintiffs aver that the actual clearance was one hundred forty-three feet.” (Record 21-22; 37.)

The Circuit Court of Appeals said:

“We pass by without decision the question as to whether or not the alleged waiver was asserted in the declaration, as well as the question whether such assertion was necessary; for we find nothing in the declaration inconsistent with the claim of such waiver, in case plaintiffs’ contention there stated that a clear space of one hundred feet actually existed, should not be sustained; and the objection to the offered testimony did not clearly raise a question of pleading.” (Record 102.)

The general rule of law, as we understand it, requires the plaintiff who bases a recovery upon the ground of estoppel, to specially plead the facts on which the estoppel is based. As it is put by Cyc.:

“Estoppel as an element of a cause of action, is not available unless specially pleaded.”

Cyc., Vol. XVI, p. 808.

This is the rule in Tennessee.

Newport Cotton Mill Co. vs. Mims, 103 Tenn., 465;

Read vs. Street Ry., 110 Tenn., 316, 330.

Smith vs. Cross, 125 Tenn., 163, 176.

With relation to a waiver relied on to overcome a provision of an insurance contract, Cooley says:

“It is a general rule where pleadings contain allegations showing a forfeiture or avoidance of a policy, it is incumbent upon plaintiff to plead any waiver or estoppel on which he intends to rely.”

Cooley's Briefs on Ins., Vol. III, 2768;

Battin vs. Insurance Co., 65 C. C. A., 358;

Mecca Ins. Co. vs. Moore, 128 S. W., 441;

McLeod vs. Travelers Ins. Co., 70 S. E., 157.

If an insured pleads a compliance with the provisions and conditions of the policy, he cannot afterwards be heard to say those conditions were waived.

McLeod vs. Ins. Co. (Ga.), *supra*.

Hoffman vs. Ins. Co., 119 N. Y. Supp., 978.

The defendant insurer pleaded a breach of the clear space warranty. (Record 46.)

This plea was struck out at the instance of the insured as irrelevant (Record 47-54), the theory of the plaintiffs' counsel and of the Court being that the defense there specially pleaded was permissible under the general issue. Aside from that, the declar-

ation on its face showed that the failure to pay was due to an alleged violation of the clear space warranty. So that the forfeiture of the contract because of such violation was clearly in issue, and clearly known to the plaintiff.

Under the rule announced above, the plaintiff should have averred facts tending to show waiver, either in the original declaration or by way of replication.

It being the rule of procedure in the State of Tennessee that estoppel, to be available, must be specially pleaded, under the Conformity Act, the same procedure applied in the Federal Court.

If it was essential to plaintiffs' cause of action to plead the facts relied on by way or estoppel or waiver, it of course follows that in case they did not plead them, proof would not support a judgment; and hence the conclusion of the Circuit Court of Appeals that the objection to the testimony offered for the purpose of showing estoppel did not raise a question of pleading, is in our opinion inapplicable.

In view of all of the foregoing, we ask that the decision of the Circuit Court of Appeals be reversed, and that the judgment of the District Court be affirmed.

R. LEE BARTELS,
Attorney.

FILED
FEB 8 1915
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK,
et al.

vs.

No. 279.

O. C. RIFE, et al.

BRIEF AND ARGUMENT FOR THE ASSURED.

CARUTHERS EWING,
MARSILLIOT & CHANDLER,
Attorneys for Assured.

INDEX

	Page
Argument	19
Case Stated	1
Estoppel not pleaded was not raised at trial....	53
Insurer claimed benefits under Contract and lulled Assured into safety	27
Knowledge of Insurer	3
Michigan cases reviewed	48
New Jersey cases reviewed	38
Offer to prove Insurer's knowledge of conditions	21
Propositions of Law	10
Agent cannot waive conditions of policy.....	11
Election of Insurer not to avoid policy.....	12
Estoppel or Waiver	15
Objection that certain evidence is hearsay not made below	18
Policy involved is Renewal	10, 24
Written Contract cannot be varied by parol..	11
Review of Cases approved by this Court.....	50
Situation of Parties	8
Texas Cases Reviewed	44
Wisconsin Cases Reviewed	46

TABLE OF CASES

	Page
Aetna Life Ins. Co. v. Frierson, 114 Fed., 56....	14, 36
Aetna Ins. Co. v. Holcomb, 89 Tex., 404....	15, 25, 46
Aetna v. Moore, 231 U. S., 543.....	11
Agri. Ins. Co. v. Potts, 55 N. J. L., 158.....	15, 43
Ala. State Ins. Co. v. Long Clothing Co., 123 Ala., 667	17
Allen v. Ins. Co., 123 N. Y., 6; 25 N. E., 309.....	17
Arnold v. Amer. Ins. Co., 148 Cal., 660.....	18
Asso. v. Turner, 19 Tex. Civ. App., 346	52
Bennett v. Ins. Co., 70 Ia., 600; 31 N. W., 948....	17
Carson v. Jersey City Ins. Co., 43 N. J. L., 300...	39
Clay v. Phoenix Ins. Co., 97 Ga., 44; 25 S. E., 417	18
Clemments v. German Ins. Co., 153 Fed., 237....	36
Con. Ins. Co. v. Cummings, 98 Tex., 115.....	15, 46
Cooley's Briefs on the Law of Ins., Vol. 1, p. 849	10
Dahrooge v. Fire Assur. Co., 175 Mich., 248....	15, 48
Dimick v. Met. Life Ins. Co., 69 N. J. L., 384, 397.	40
Dwelling House, etc., Co. v. Brodie, 52 Ark., 17; 4 L. R. A., 460	52
Ellison v. Gray, 55 N. J. Eq., 581	12, 40
England v. Ins. Co., 91 Mich., 443.....	12, 44
England v. Westchester, etc., Co., 81 Wis., 583..	46
Eq. L. Assur. So. v. Ellis, 105 Tex., 526.....	15, 45
Farmers' Feed Co. v. Ins. Co., 166 Fed., 111....	16
Franklin Fire Ins. Co. v. Martin, 40 N. J. L., 568	12, 38, 40, 44
Frost v. Saratoga Mut. Ins. Co., (N.Y.), 5 Denio, 154	51
German-American Ins. Co. v. Harper, 75 Ark., 98; 86 S. W., 817	18
German Ins. Co. v. Kline, 44 Neb., 395.....	52
Gish v. Ins. Co. of Nor. Am. (1905), 16 Okla., 59; 13 L. R. A. (N. S.), 826	11

TABLE OF CASES—Continued

iii

	Page
Glasscock v. Des Moines Ins. Co., 125 Ia., 170; 100 N. W., 503	17
Glen Falls Ins. Co. v. Michael, 167 Ind., 659; 8 L. R. A. (N. S.), 708	17
Globe Mut. L. Ins. Co. v. Wolff, 95 U. S., 326....	14, 31
Glover v. Natl. Fire Ins. Co., 85 Fed., 125, 129...	25
Gray v. Natl. Ben. Asso., 111 Ind., 531; 11 N. E. 633	17
Grisby v. Russell, 222 U. S., 149, 155.....	13
Grunauer v. Westchester Ins. Co., 72 N. J. L., 289, 293	40
Hagan v. Ins. Co., 81 Ia., 321; 46 N. W., 1114....	17
Haggart v. Wilczinski, 143 Fed., 22, 27.....	13
Hamilton v. Ins. Co., 94 Mo., 353; 7 S. W., 261....	17
Hause v. Standard, etc., Co., 172 Mich., 59.....	15, 48
Hay v. Star Fire Ins. Co., 77 N. Y., 256.....	10, 27
Home Ins. Co. v. Marple, 1 Ind. App., 411; 27 N. E., 633	17
Horton v. Home Ins. Co., 122 N. C., 498; 29 S. E., 944	18
Ia. Ins. Co. v. Lewis, 187 U. S., 335	14, 37
Ind. Mut. Indemnity Co. v. Thompson (Ark. 1907) 10 L. R. A. (N. S.), 1064	11
Ins. Co. v. Covey, 41 Neb., 724; 60 N. W., 12....	17
Ins. Co. v. Freeman, 19 Tex. Civ. App., 635	52
Ins. Co. v. Hammang, 44 Neb., 566; 62 N. W., 883	17
Ins. Co. v. Norton, 96 U. S., 234	14, 33
Ins. Co. v. Pankey, 91 Va., 259	18
Ins. Co. v. Slockbower, 26 Pa. St., 199.....	51
Ins. Co. v. Wilkinson, 13 Wall, 232	14, 30
Kahn v. Ins. Co. (Wyo.), 34 Pac., 1059	17
Keller v. L. & G. Ins. Co., 27 Tex. Civ. Ap., 102. 12, 44	

TABLE OF CASES—Continued

Page

Ky. Vermillion, etc., Co. v. Norwich, etc., Co., 146 Fed., 695	12, 48
Knoebel v. No. Amer., etc., Co., 135 Wis., 424. .	15, 47
Kupferschmidt v. Agri. Ins. Co., 80 N. J. L., 441	12, 40
Laxton v. Patron, etc., Co., 168 Mich., 448.	15, 48
Leisen v. St. P. F. & M. Ins. Co. (N. D.), 127 N. W., 837; 30 L. R. A. (N. S.), 539.	17, 35
L. & L. Ins. Co. v. Fischer, 92 Fed., 500.	16
Mallette v. Assur. Co., 91 Md., 471	10, 27
Martin v. Jersey City Ins. Co., 44 N. J. L., 273	10, 15, 27, 39, 41
Met. Life Ins. Co. v. Williamson, 174 Fed., 116. .	16
Mill. Mut., etc., Co. v. Mec., etc., Asso., 43 N. J. L., 652	15, 41
Morrison v. Ins. Co., 69 Tex., 353; 6 S. W., 605. .	17
Mulrooney v. Royal Ins. Co., 163 Fed., 833.	36
Murray v. State Life Ins. Co., 151 Fed., 539.	14
Mut. L. Ins. Co. v. French, 30 Ohio St., 240; 27 Am. Rep., 443	18
N. Y. L. Ins. Co. v. Evans (Ky.), 124 S. W., 376. .	17
Northern Assur. Co. v. Bldg. & Loan Asso., 183 U. S., 308	11, 34, 36
Ohio, etc., Co. v. Vogel, (Ind.), 3 L. R. A. (N. S.), 966	25, 47
O'Neill v. Northern, etc., Co., 155 Mich., 564. .	15, 48
Penman v. St. P. F. & M. Ins. Co., 216 U. S., 311	11, 36
Phoenix Ins. Co. v. Hart, 149 Ill., 513; 36 N. E., 990	17
Phoenix Ins. Co. v. Johnston, 143 Ill., 106.	17
Phoenix, etc., Ins. Co. v. Raddin, 120 U. S., 183,	13, 14, 34

TABLE OF CASES—Continued

v

Page

Polk v. Western Assur. Co., 114 Mo. App., 514; 90 S. W., 397	18
Ramsey v. Travelers, etc., Asso., 147 Wis., 405.	15, 47
Redstrake v. Cum. Ins. Co., 44 N. J. L., 294....	15, 42
Rice v. New England, etc., Soc., 146 Mass., 248..	52
Robinson v. Belt, 187 U. S., 41, 50	18
Rochester German Ins. Co. v. Schmidt, 151 Fed., 681	16
Ry. Co. v. Harris, 63 Fed., 800	23
Schmurr v. State Ins. Co., 30 Ore., 29; 46 Pac. 363	18
Security, etc., Co. v. Calvert, 101 Tex., 128....	15, 46
Seidel v. Equitable, etc., Co., 138 Wis., 66.....	47
Selby v. Mut. etc., Co., 67 Fed., 490	52
Sharman v. Con. Ins. Co. (1914), 167 Cal., 117; 52 L. R. A. (N. S.), 670	11
Shea v. Mass. Ben. Asso., 160 Mass., 298	52
Shingle Co. v. Ins. Co., 91 Mich., 443.....	12, 44, 48
St. Clair v. U. S., 154 U. S., 134, 153	18
State Life Ins. Co. v. Murray, 159 Fed., 408....	14
Trade Ins. Co. v. Barracliff, 45 N. J. L., 543, 554..	39
Traders' Ins. Co. v. Letcher, 143 Ala., 400; 39 So. 271	17
Union Nat. Bank v. Manhattan L. Ins. Co., 52 La. Ann., 36; 26 So., 800	18
Viele v. Ger. Ins. Co., 26 Ia., 9	50
Vivar v. Knights of Pythias, 52 N. J. L., 455....	40
Wagner v. Westchester, etc., Co., 92 Tex., 549..	15, 46
West Coast Lumber Co. v. State, etc., Co., 98 Cal., 502, 508	25, 47
Williams v. Bank, 2 Peters, 102	50
Williams v. Relief Asso., 97 Me., 158	52

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK,

et al.

vs.

No. 279.

O. C. RIFE, et al.

BRIEF AND ARGUMENT FOR THE ASSURED.

STATEMENT OF CASE.

The assured (a partnership) operated a sawmill at Tribbett, Mississippi, and, desiring to insure the lumber there being cut, approached D. A. Fisher, agent of the insurer at Memphis, to obtain insurance to protect them against loss. (Rec. 64; Print 61.) Tribbett is a small place in Mississippi, and assured operated the only mill then in operation at that place. (Rec. 76; Print 72.)

The policy sued on is a *renewal* of an earlier policy.

Rec. 64; Print 61.

The policy is in standard form and contains the provision that "*this policy may by a renewal be continued* under the original stipulations, in consideration of premium for the renewed term, provided

that any increase of hazard must be made known to the attorney at the time of renewal or this policy shall be void."

Line 49 of Policy, Print 86-87.

(The "attorney" mentioned above is the agent and representative who acts for the individuals associated as and under the name of the insurer).

When the original policy was obtained the conditions existing at the mill were explained to the insurer's agent (Record 64; Print 61) and these conditions were thereafter the same; i. e., there was no change in the condition and situation of the property between the date of original policy and the fire.

Record 81; Print 76.

After the original policy was issued a plat of the premises was prepared, exhibiting the exact situation, and this was delivered to the agent of the insurer. (It was sent to L. H. Gage & Co.—Rec. 66; Print 62—and by that company delivered to the agent of the insurer. Record 86, 87; Print 81.)

While the original policy was in force and before the renewal policy here involved was issued the insurer sent an inspector to the mill and, through this inspector, the conditions existing, and which were maintained until the fire, were made known to the insurer.

Record 81; Print 76.

This was first developed in the examination of F. A. Stutzman, one of the assured:

"Q. Now, I will ask you whether in 1909, before the issuance of the present policy and while policy No. 27566 was in existence, an inspector for the Lumber Underwriters, the defendant, came to the mill and made any measurements and examination?

Mr. Bartels: I object to the question.

Objection sustained.

Plaintiff excepts.

Mr. Ewing: The plaintiff offers to show by this witness that the inspector of the defendant did come and did make measurements and observations and see and know the conditions there. I forgot to include in that question and I desire to do so—were the conditions at the fire substantially and practically the same as when this inspector came in 1909?

Mr. Bartels: I object to that question.

Objection sustained.

Plaintiff excepts.

Mr. Ewing: I want to show that the conditions were about the same and continued the same, that there was no material change made, and the witness, if permitted to answer, would state that the conditions remained the same."

Record 31; Print 76.

And the same fact was adverted to while James R. Blair, connected with L. H. Gage & Co., was being examined as a witness:

"Q. Mr. Blair, did Mr. Fisher call your attention to the fact that his Company had sent

an inspector to this property and had examined it prior to or some time in May or June, 1909, and that the company had the report of this inspector showing the condition?

Mr. Bartels: I object to the question. It is not relevant to the matter at issue and is wholly immaterial and irrelevant.

Objection sustained.

Mr. Ewing: The plaintiff excepts to the ruling of the Court and offers to show that the insurance association itself received the report of this inspector."

Record 88; Print 82.

It should be explained that the connection of L. H. Gage & Co. with the matter was this: The assured operated a sawmill at which their logs as well as the logs of others were sawed into lumber, and logs belonging to L. H. Gage & Co. were "sawed up," as is the lumberman's phrase. The lumber from these logs was piled with the lumber of the assured. (Record 86; Print 80.) In February, 1909 (the policy sued on was issued on May 22, 1909, in renewal of one expiring on that day), Mr. Blair, representing L. H. Gage & Co., called on insurer's agent and explained to him that Gage & Co. had lumber on the assured's mill yard "indiscriminately mixed" with theirs and caused to be noted on a policy obtained by Gage & Co. on their lumber an "exception" of the fixed or permanent structures within the so-called "clear space" provision of the policy. Such an "exception," which waives the supposed violation of the so-called "clear space" provision,

is made as a matter of course by an insurance company and without any charge whatever.

Record 87, 88; Print 81, 82.

The assured's idea at the trial was that the noting of an "exception" on the policy, without charge and as a matter of course, was simply the company's written acknowledgment of notice or knowledge of the situation or condition and its agreement that the policy should, notwithstanding the supposed violation of the "clear space" provision, remain in force.

The member of the firm acting for the assured never read the original or renewal policy (Record 75; Print 71), though he could read; he had, when obtaining the policy, "explained the conditions to Mr. D. A. Fisher, the agent, and told him he would pile his lumber 100 feet *from the mill*" (Record 64; Print 61), and relied on the policy covering the lumber.

On the standard form of policy there is pasted what is known as the "Lumber Form," and this contains the warranty that a "continuous clear space" of 100 feet will be maintained between the lumber and the mill.

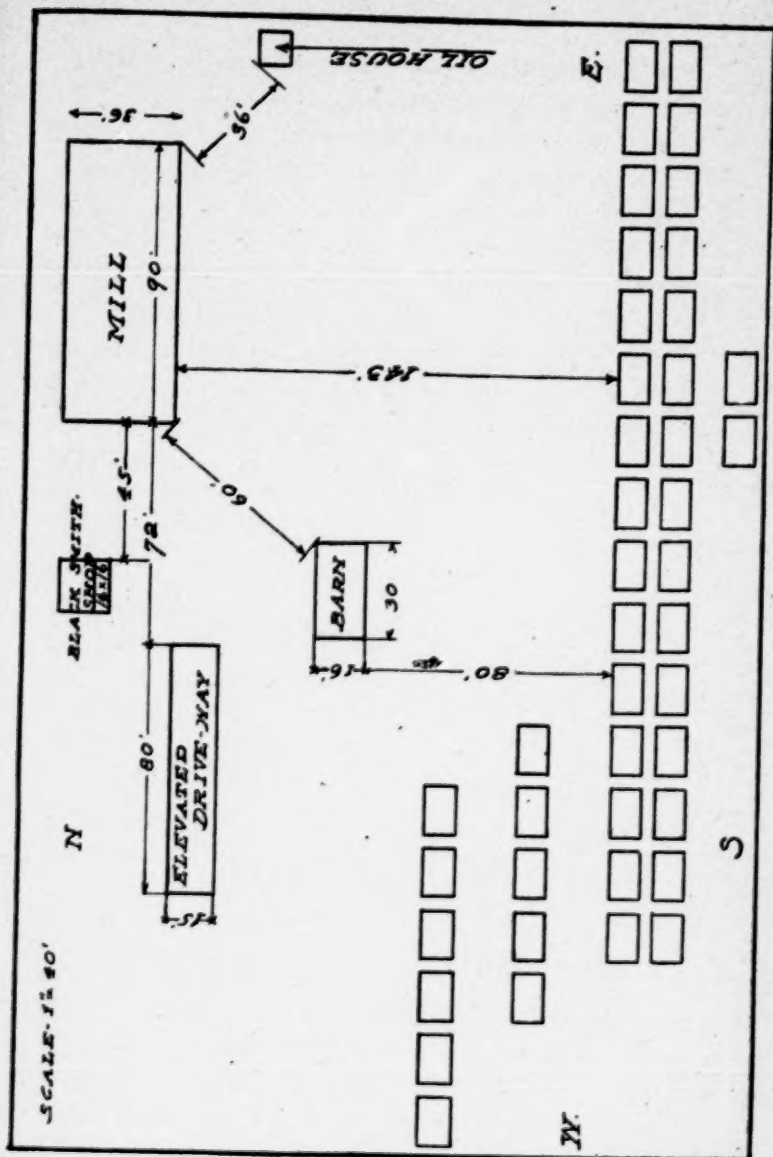
See Policy, Record 94; Print 87.

The lumber was actually piled 143 feet due south of the mill (Record 65; Print 62), but as the lumber piles were extended west they were carried beyond a barn southwest of the mill so that between

the extension to the west and the mill was this barn, wherein mules were stabled (Record 67; Print 64), and as the lumber piles were extended to the east they were carried beyond a small oil house, southeast of the mill, wherein lubricating oil was kept, which oil house thus came between the mill and the extended lumber piles.

Record 68; Print 64-65.

The exact situation, known to the company while the original policy was in force and known to be existing when the renewal, the policy sued on, was issued and premium paid, being about as follows:



The fire which destroyed the lumber originated in or at the mill (Record 60; Print 68), and a high wind carried the sparks or cinders over and across the 143 feet between the mill and the lumber (Record 61; Print 59), causing the latter to ignite. The wind was such, in fact, that a house 1,500 feet from the mill was set on fire.

Record 61; Print 58.

The insurer denied liability solely on the ground that the extension of the lumber, piled 143 feet from the mill, carried the piles to such points or places that between the piles, thus extended, and the mill was a barn (southwest of the mill) and an oil house (southeast of the mill), and this barn and this oil house were less than 100 feet from the mill. The barn was 60 feet from the mill and 80 feet from the extension of the lumber; the oil house was 36 feet from the mill and less than 100 feet from the lumber piles.

There was also a driveway or platform, used for loading lumber (Record 69; Print 66) between the west extension of the lumber piles and the mill, but this was permissible under the policy.

The situation, then, was this:

The assured, operating a sawmill, desired to insure their lumber and told the insurer's agent the exact facts; the policy was written and the assured relied on its being a protection, as it was presumed to be so written as to accomplish the end desired;

the insurer confirmed the assured's statements as to the situation and surroundings by sending an inspector to the mill; another's lumber, piled as was, and with, the assured's, was likewise insured and, without charge, an exception was noted of the things now urged as a violation of the "clear space" clause; the original policy expired and a renewal was issued, pursuant to the terms of the contract, the insurer knowing the situation, surroundings and conditions and accepting the premium; the assured were led to believe that their lumber was insured; a fire destroyed the lumber and the insurer's proposition is that the lumber which the assured tried to insure and thought was insured, had never been really protected, though the premium on a renewal policy had been paid by the assured and retained by the insurer with full knowledge of all the facts which it now says made the contract, from the beginning, "null and void."

PROPOSITIONS OF LAW.

I.

The policy in force when the fire occurred being a renewal of a previous policy, is but a continuation of the original contract of insurance.

Mallette v. Assur. Co., 91 Md., 471.

Hay v. Star Fire Ins. Co., 77 N. Y., 235.

Martin v. Jersey City Ins. Co., 44 N. J. L., 273.

Cooley's Briefs on the Law of Ins., Vol. 1, p. 849.

The proposition stated is somewhat at war with the treatment of a renewal policy by the Circuit Court of Appeals, Ninth Circuit, in *Ky. Vermillion, etc., Co. v. Norwich, etc., Co.*, 146 Fed., 695, wherein, however, it does not appear that the policy contained the contract of renewal feature to be found in the present policy.

The proposition as stated is believed to be sound, generally speaking, despite the case just cited, but the proposition is submitted as indubitably sound in view of the policy provision as to continuing the original contract in force on payment of the renewal premium. The previous policy, presumptively, was the same as the policy later issued, nothing occurring to justify any change in terms.

If correct in the foregoing, this contract of insurance originated May 22, 1908, and was renewed on May 22, 1909, and the renewal premium accepted

at a time when the insurer had full and complete knowledge of every fact now set up as invalidating the contract.

II.

No waiver of a condition or provision of the policy could result from any fact known to the insurer's agent issuing the policy at the time the policy was issued—the agent being without express authority from the insurer to make the waiver and the written contract providing in substance against this result.

Northern Assur. Co. v. Bldg. & Loan Asso.,
183 U. S., 308.

Penman v. St. P. F. & M. Ins. Co., 216 U. S.,
311

Aetna Ins. Co. v. Moore, 231 U. S., 543.

Gish v. Ins. Co. of Nor. Am. (1905), 16
Okla., 59; 13 L. R. A. (N. S.), 826, see
annotation.

Ind. Mut. Indemnity Co. v. Thompson
(Ark., 1907), 10 L. R. A. (N. S.), 1064,
see annotation.

Sharman v. Con. Ins. Co. (1914), 167 Cal
117; 52 L. R. A. (N. S.), 670.

III.

The written contract whereby the assured agreed
“that a continuous clear space of 100 feet shall at
all times be maintained between the property in-
sured and any woodworking or manufacturing es-
tablishment” cannot be varied by parol evidence

that the assured was not to maintain such continuous clear space.

See authorities *supra*.

Franklin Fire Ins. Co. v. Martin, 40 N. J. L., 568.

Kupferschmidt v. Agri. Ins. Co., 80 N. J. L., 441.

Ellison v. Gray, 55 N. J. Eq., 581.

Keller v. L. & G. Ins. Co., 27 Tex. Civ. App., 102.

England v. Ins. Co., 81 Wis., 583.

Shingle Co. v. Ins. Co., 91 Mich., 443.

Ky. Vermillion, etc., Co. v. Norwich, etc., Co., 146 Fed., 695.

(The cases to this point are so numerous that further citation is unnecessary, and the citation here made is of cases relied on by the insurer and later discussed).

IV.

By the terms of the original policy the assured warranted that a continuous clear space of 100 feet would be maintained between the lumber and the mill, and it was, so the policy reads, "agreed and understood by the assured that any violation of this warranty shall render this policy null and void." The insurer, when the contract was made, had a legal right to expect that this warranty would be made good and that the continuous "clear space" required by the policy would be maintained. The effect of assured's failure to make this warranty good was to give the insurer the right to abrogate

the contract. The provision was for the benefit and protection of the insurer. Within the term of the original policy it was made known to the insurer that the policy had become, at its option, "null and void."

The word "void" is often used in the sense of "voidable," as is well illustrated by the Circuit Court of Appeals, Fifth Circuit, in *Haggart v. Wilczinski*, 143 Fed. 22, 27. The same thing is stated with equal clearness in—

Grigsby v. Russell, 222 U. S. 149, 155.

The insurer thereafter and with this knowledge collected a premium on the contract and issued a renewal thereof. The insurer, by treating the contract as in force rather than as "null and void," led the assured to believe that by continuing conditions as they were known to the company to exist, a forfeiture of the policy would not be incurred. By this conduct of the insurer was the assured lulled into security.

The insurer elected not to avoid the policy, but treated it as in full force and received new benefits therefrom, and became, as a matter of law, charged with its burdens.

"To hold otherwise," adopting the language of this Court, speaking through Mr. Justice Gray in *Phoenix, etc., Ins. Co. v. Raddin*, 120 U. S., 183, "would be to maintain that the contract of insurance requires good faith of the assured only and

not of the insurer, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens."

Ins. Co. v. Wilkinson, 13 Wall., 232.

Globe Mut. L. Ins. Co. v. Wolff, 95 U. S., 326.

Insurance Co. v. Norton, 96 U. S., 234.

Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S., 183.

Ia. Ins. Co. v. Lewis, 187 U. S., 335.

State Life Ins. Co. v. Murray, 159 Fed. 408.

Murray v. State Life Ins. Co., 151 Fed. 539.

Ætna Life Ins. Co. v. Frierson, 114 Fed. 56, wherein Judge Lurton referred to *Ins. Co. v. Wolff*, 95 U. S. 326, and *Ins. Co. v. Norton*, 96 U. S. 234, and said:

"However much those decisions may be regarded as doubted by *Northern Assur. Co. v. Grand View Bldg. Ass'n.*, the doubt does not extend to the question of the power of an insurance company to waive any provision or condition of the policy intended for its protection."

And, setting forth the principle here insisted upon, said:

"In *Northern Assur. Co. v. Grand View Building Ass'n.*, there is nothing in conflict with this. The court there upheld a provision in the policy which required consent to other insurance to be indorsed thereon in writing by the agent issuing the policy. The waiver then relied on was waiver resulting from the mere knowledge of

the agent that such other insurance existed at the time he issued the policy."

Mill. Mut., etc., Co. v. Mec., etc., Asso., 43 N. J. L., 652.

Martin v. Jersey City Ins. Co., 44 N. J. L., 273.

Redstrake v. Cum. Ins. Co., 44 N. J. L., 294.

Agri. Ins. Co. v. Potts, 55 N. J. L., 158.

(New Jersey cases are cited for insurer.)

Aetna Ins. Co. v. Holcomb, 89 Tex., 404.

Wagner v. Westchester, etc., Co., 92 Tex., 549.

Con. Ins. Co. v. Cummings, 98 Tex., 115.

Security, etc., Co. v. Calvert, 101 Tex., 128.

Eq. L. Assur. So. v. Ellis, 105 Tex., 526.

(A Texas case is cited for the insurer.)

Knoebel v. North American, etc., Co., 135 Wis., 424.

Ramsey v. Travelers, etc., Asso., 147 Wis., 405.

(A Wisconsin case is cited for the insurer.)

O'Neill v. Northern, etc., Co., 155 Mich., 564.

Laxton v. Patron, etc., Co., 168 Mich., 448.

Hause v. Standard, etc., Co., 172 Mich., 59.

Dahrooge v. Fire Assur. Co., 175 Mich., 248.

(A Michigan case is cited for the insurer.)

V.

The proposition advanced is that parol evidence, while not admissible to vary the terms of a written contract, is permissible and is usually the only evidence to be adduced to establish facts which show

that the contract as originally written was subsequently altered, expressly or by necessary implication.

The further proposition being that if a contract be "null and void" as written, because of the failure of one of the parties to conform to a stipulation therein, the same may be made effective by any subsequent course of conduct of the party at whose option the contract was "null and void," which signifies an intention to treat the contract as in force. This result attaches to (1) accepting a benefit under the contract to which the party would not be entitled except on the theory that the contract was not "null and void," (2) acquiescence in the other party's course of dealing with the contract on the theory that it was still effective, (3) lulling the other party into that security which the belief that he had the protection afforded by the contract could alone produce, and (4) failure to signify non-acquiescence in the situation when and while benefits are being derived from the contract and maintaining silence until the time comes to bear a burden imposed by the contract.

See authorities *supra*.

L. & L. Ins. Co. v. Fischer, 92 Fed., 500.

Rochester German Ins. Co. v. Schmidt, 151 Fed., 681.

State Life Ins. Co. v. Murray, 159 Fed., 408.

Farmers' Feed Co. v. Ins. Co., 166 Fed., 111.

Met. Life Ins. Co. v. Williamson, 147 Fed., 116.

- Bennett v. Ins. Co.*, 70 Ia., 600; 31 N. W., 948.
- Hagan v. Ins. Co.*, 81 Ia., 321; 46 N. W., 1114.
- Hamilton v. Ins. Co.*, 94 Mo., 353; 7 S. W., 261.
- Ins. Co. v. Corey*, 41 Neb., 724; 60 N. W., 12.
- Ins. Co. v. Hammang*, 44 Neb., 566; 62 N. W., 883.
- Allen v. Ins. Co.*, 123 N. Y., 6; 25 N. E., 309.
- Morrison v. Ins. Co.*, 69 Tex., 353; 6 S. W., 605.
- Kahn v. Ins. Co. (Wyo.)*, 34 Pac., 1059.
- Ala. State Ins. Co. v. Long Clothing Co.*, 123 Ala., 667.
- Phoenix Ins. Co. v. Johnston*, 143 Ill., 106.
- Leisen v. St. P. F. & M. Ins. Co. (N. D.)*, 127 N. W., 837; 30 L. R. A. (N. S.), 539.
- (See vast array of authorities cited in the opinion.)
- Home Ins. Co. v. Marple*, 1 Ind. App., 411; 27 N. E., 633.
- Glen Falls Ins. Co. v. Michael*, 167 Ind., 659; 8 L. R. A. (N. S.), 708.
- Gray v. Natl. Ben. Asso.*, 111 Ind., 531; 11 N. E., 477.
- Traders' Ins. Co. v. Letcher*, 143 Ala., 400; 39 So., 271.
- Phoenix Ins. Co. v. Hart*, 149 Ill., 513; 36 N. E., 990.
- N. Y. L. Ins. Co. v. Evans (Ky.)* 124 S. W., 376.
- Glasscock v. Des Moines Ins. Co.*, 125 Ia., 170; 100 N. W., 503.

Polk v. Western Assur. Co., 114 Mo. App., 514; 90 S. W., 397.

Horton v. Home Ins. Co., 122 N. C., 498; 29 S. E., 944.

Mut. L. Ins. Co. v. French, 30 Ohio St., 240; 27 Am. Rep., 443.

German-American Ins. Co., v. Harper, 75 Ark., 98; 86 S. W., 817.

Clay v. Phoenix Ins. Co., 97 Ga., 44; 25 S. E., 417.

Union Nat. Bank v. Manhattan L. Ins. Co., 52 La. Ann., 36; 26 So., 800.

Schmurr v. State Ins. Co., 30 Ore., 29; 46 Pac., 363.

Arnold v. Amer. Ins. Co., 148 Cal., 660.

Ins. Co. v. Pankey, 91 Va., 259.

VI.

The objection now made by the insurer that the evidence by which the insurer's knowledge was sought to be shown was hearsay ignores direct proof of the fact (Rec. 81; Print 76), and is addressed to the evidence of the witness Blair (Rec. 88; Print 82). No such objection being made below, the question cannot be made in this Court.

The same principle is applicable to the insistence that an estoppel was not pleaded, though every fact necessary to show an estoppel was averred.

St. Clair vs. U. S., 154; U. S., 134, 153.

Robinson v. Belt, 187 U. S., 41, 50.

(This proposition really needs no citation of authority to sustain it.)

ARGUMENT.

The propositions which we have stated, if sound, must result in the affirmance of the judgment pronounced by the learned Court of Appeals, Sixth Circuit.

We have made elaborate citation of authorities and have examined a vast multitude of cases not deemed necessary to cite because, not only is there hopeless confusion in the cases, but it requires a careful analysis of the facts of each case to understand the principle applied in the particular case, and such analysis would unnecessarily enlarge this presentation.

The Court will have understood that the basic facts on which the assured relies are:

1. That the policy sued on is but a renewal of a policy originally issued May 22, 1908, and is, in legal contemplation, a continuance of that original contract.

2. That within the term or life of the original contract and prior to the renewal made the basis of this suit, the insurer (not only through the agency issuing the policy, but through a special agent sent for that purpose) became acquainted with the condition and situation of the property supposed to be protected by the policy and consequently had made known to it all the facts and also the construction the assured placed on the terms of the policy.

3. That with this knowledge and information the insurer led the assured to believe that the policy was in full force and effect rather than "null and void" and thus lulled the assured into security.

4. That with this knowledge and information entitling it to treat the contract as "null and void," the insurer elected to treat it as in full force and effect and evidenced and manifested this election by its silence and by thereafter collecting a premium from the assured, to which the insurer was not entitled, in law or morals, except on the idea that the contract was not "null and void."

It is not believed that the establishment of a single one of the foregoing facts invades the salutary rule against varying or altering a written contract by parol evidence, but that the determinative principle is to be found in that principle, universally recognized, that a provision of a contract for the benefit of a party may be waived by such party and that such waiver is established by evidence of declarations or conduct recognizing that the breach of the provision for its benefit is not to be treated by it as a basis for declaring the contract at an end. The logic of the thought being that when one consciously and understandingly claims a benefit under a contract which he is entitled to abrogate and annul, every burden of the contract is thereby assumed, for there is no rule of law or morals which entitles a party to say that a contract is in force in so far as reaping benefits therefrom is concerned,

but is not in force in so far as imposing burdens is concerned.

Offer to Prove Insurer's Knowledge of Conditions.

It is well to dispose primarily of the proposition that the evidence by which knowledge of the company of the situation and condition of the property supposedly insured was hearsay evidence and, therefore, incompetent. The argument, for the insurer, in this behalf is that the assured offered to show by the evidence of the witness Blair that the insurer had such knowledge, by showing a statement made by a Mr. Fisher, agent of the insurer. The proposition advanced in this behalf is that no declaration by the agent, Fisher, was admissible against the insurer. It is conceded that any declaration by the agent, Fisher, outside of and beyond the scope of his agency is, as against the insurer, hearsay, and hence incompetent. From the record, however, it is fair to infer that Mr. Fisher was something more than a mere agent to deliver policies and receive premiums. In February, 1909, Mr. Blair, representing L. H. Gage & Company, went to Mr. Fisher and explained to him that L. H. Gage & Company had lumber on the same yard, indiscriminately piled with the lumber of the assured (Rec. 87; Print 81), and an "exception" was noted on the policy, and the examination of Mr. Blair was proceeded with to show that the attention of Mr. Blair

was attracted to an inspection by the insurer in May or June, 1909, by a statement made to him by Mr. Fisher (Rec. 88; Print 82). The question, as asked, dealt with nothing more nor less than that Mr. Blair's attention was called to this fact by Mr. Fisher, and the investigation was stopped by the Court on the objection of the insurer's attorney, which objection did not suggest that the ultimate fact was to be established by hearsay evidence, but the sole ground for objection was that what the company knew was "wholly immaterial and irrelevant." The Court stopped the assured's inquiry and investigation into the question of the insurer's knowledge of the facts and the assured, in excepting to this ruling, offered "to show that the insurance association itself received the report of this inspector."

Rec. 88; Print 82.

A most casual examination of the record shows that it was never in the mind of the trial Court nor of the insurer's attorney that objection was being made to the *manner* of proving the insurer's knowledge, but the objection went wholly and entirely to the establishment of the fact.

It does not lie in the mouth of a party to a lawsuit to prevent an inquiry into a fact on the ground that such fact, if established, is immaterial, and thereby prevent further inquiry with respect thereto, and thereafter in an appellate court say that, though the fact be relevant or material, the method and manner of establishing it was improper.

In other words, it would work injustice and wrong if a party were permitted to stop an inquiry with respect to the existence of a fact on the ground that it was not competent to establish such fact, and thereafter be heard to say that his adversary had proposed to establish it by incompetent evidence, to-wit, hearsay. The trial Court in the instant case stopped the inquiry and it could not have been pursued, and it does not necessarily follow from the preliminary question asked Mr. Blair that subsequent development of the fact was to be by hearsay evidence. An offer to prove the fact is equivalent here to proper proof thereof.

"The rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence. *Big Estop.* (5th Ed.) 720; *Thompson v. McKay*, 41 Cal. 221; *Jobbins v. Gray*, 34 Ill. App. 208, 218, 219; *Insurance Co. v. O'Connell*, Id. 357, 362; *Ellioss*, App. Proc. Sec. 630. The defendant will not be allowed to thus take advantage of his own wrong, or the errors of the Court induced on his own motion, and then compel the plaintiff to suffer the consequences. Such a proceeding would be the merest trifling with the Court. *Jobbins v. Gray*, *supra*. If the rule were otherwise it would encourage and reward unfounded and groundless objections to the plaintiff's evidence, and tend to promote sharp practice and chicanery."

Ry. Co. v. Harris, 63 Fed., 800.

The offer was to prove the fact, and the objection now made by the insurer in this Court, even if permissible and well taken in so far as it relates to the evidence of the witness Blair, could not in the remotest degree affect the assured's offer in the lower Court, while F. A. Stutzman was on the stand. The offer was to prove the fact by him.

Rec. 81; Print 76.

We shall, therefore, proceed in this Court on the theory that, for all the purposes of this hearing, the insurer is to be charged with knowledge of every fact, circumstance and condition which at the trial the assured offered to establish and was prevented from establishing by the ruling of the Court on the insurer's objection that such evidence was "immaterial and irrelevant."

Policy Sued On is a Renewal.

It may or may not be necessary to the assured's case that the Court treat the policy in question as a continuation or renewal of the original policy issued May 22, 1908. We believe that by so treating it assured's position is strengthened, though should the policy sued on be treated as an original contract having no relation to its predecessor contract, our argument would not entirely fail, for this reason: It would then be seen that as between assured and insurer were successive contracts originating with a contract dated May 22, 1908, covering one year from that date; that within the year and while the original contract was effective, the insurer became

acquainted with the situation and condition of the insured property and had made known to it the assured's idea of what was requisite to enable them to keep their lumber insured; thereafter the insurer issued the contract sued on with this knowledge and gave the assured no information or intimation that the writing being furnished the assured was "null and void;" the insurer demanded and received the consideration coming to it under the contract, though when it delivered same it knew (as it now says) that the writing constituted no contract, the assured believing otherwise and parting with their money on the strength of that belief.

Authorities are not wanting for the proposition that an insurance company is estopped to assert the invalidity of a policy at the time it was issued for the violation of any of the conditions of such policy, if at the time it was so issued the fact of such violation was known to the company.

(*Ætna Ins. Co. v. Holcomb*, 89 Tex. 404; *West Coast Lumber Co. v. State, etc., Co.*, 98 Cal., 502, 508; *Ohio, etc., Co. v. Vogel*, (Ind.), 3 L. R. A. (N. S.), 966; *Glover v. National Fire Ins. Co.*, 85 Fed., 125, 129, and cases heretofore cited.)

We insist, however, that the policy sued on should be treated strictly as a renewal or continuance of the contract originating May 22, 1908. The policy by its terms provided for such renewal. (Line 49 of policy, Rec. 94; Print 87):

"This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to the attorney at the time of renewal, or this policy shall be void."

In the declaration it was averred that the policy was "*a renewal of the previous policy*," and that when the original insurance was procured from the agent, Fisher, the facts were fully disclosed to him, and it was further averred that while the preceding policy was in force and effect "the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber, and with especial reference to the distance between the lumber and plaintiffs' mill."

"Plaintiffs aver that the defendant had a plat showing the exact facts in that behalf."

Rec. 38; Print 36.

At the hearing the assured offered to prove the averments of the declaration in this behalf and on objection of the insurer was not permitted to do so.

Rec. 64 *et seq.*; Print 61.

Therefore, the policy here sued on is, as we believe, to be taken and treated as it actually was, to-wit, a renewal or extension, by the payment of the premium on May 22, 1909, of a contract of insurance entered into May 22, 1908.

In *Mallette v. British Amer. Assur. Co.*, 91 Md., 471, the Court dealt with a policy containing exactly the same provision as to renewal that appears in the policy before the Court, and held that on a subsequent policy being issued the assured was justified in assuming that "the terms and conditions of the renewal will be the same as those of the original, unless he has notice of some proposed change."

In *Hay v. Star Fire Ins. Co.*, 77 N. Y., 235, it was said that "an agreement to renew a policy implies that the terms of the existing policy are to be continued, and this would be so of any instrument, in the absence of evidence that a change was intended."

In *Martin v. Jersey City Ins. Co.*, 44 N. J. L., 273, the company, while the original policy was in force, obtained knowledge of facts which entitled it to avoid the policy. A loss occurred after a renewal policy was issued. The Court held that "the renewal was made upon the basis of the old contract." "The renewal was merely an extension of the life of the old contract," said the Court.

Insurer Claimed Benefits Under Contract and Lulled Assured Into Security.

If the effort here is to alter or vary the written contract by parol evidence, the assured has no rights. The situation, as we view it, is that on May 22, 1908, the insurer issued to assured a policy which provided that it should be "null and void" unless the assured maintained a continuous clear space of 100

feet between the property insured and the mill; that contract, being in writing, cannot be varied or altered by parol evidence that another and different contract was made or intended; that contract, being in writing, all previous negotiations and declarations became merged into it and that contract became the sole and inviolate memorial in this action at law of the agreement of the parties as of that date.

We construe the words, "null and void," to mean that unless the assured complied with the warranty the insurer had the right and option to declare its liability at an end. The provision requiring the assured to maintain the stipulated clear space was for the benefit of the insurer and until and unless it waived that provision of the contract or by act or conduct estopped itself from relying thereon, the provision was operative, effective and fatal to a recovery on the policy.

The situation further is that after the making of the contract on May 22, 1908, the insurer, through a special representative sent for the purpose, to-wit, an inspector, and through a plat furnished it through its agent, Fisher, became acquainted with facts and circumstances which terminated its liability and entitled it to treat the contract as at an end. The provision which had been inserted for its benefit, to-wit, the warranty of the assured, had not been and was not being complied with and assured had breached their obligation in this behalf. The in-

surer then had two roads open to it and only two: To avail itself of the written contract and treat its obligations at an end, or, in view of benefits to be derived from the contract, treat it as continuing and thereafter accept those benefits and bear the burdens of the contract. It was not open to the insurer to repudiate the burdens of the contract while at the same time it was accepting its benefits. It could not, either in law or morals, do both. It had to do one or the other. There is no decision by this Court that an insurer, or any other party to a written contract, cannot, after breach of a condition entitling the insurer or such party to terminate the contract, waive the breach and continue bound as well as benefitted by the contract. It is not compulsory on a party to a written contract that he will avail himself of its terms. The law imposes no obligation on a party to a written contract to cancel the contract simply because he becomes entitled to do so. The right to continue a contract in force, with knowledge that it may be ended, is not one whit less than the right to make the original contract. The question becomes simply a question of how the right of election is to be evidenced. The right to elect what course to pursue under a given situation is just as valuable and inalienable as is the right to make a contract.

We shall review the authorities, not in an effort to justify parol evidence to alter or vary a contract, for we distinctly disclaim that any such effort has been made, but from a review of the authorities

we will undertake to show that the insurer waived the requirement that 100 feet of continuous clear space should be maintained between the lumber and the mill, and that by a course of conduct inconsistent with a purpose to rely upon that provision of the contract the insurer is estopped to rely on a breach of that condition to defeat a recovery.

In this case no question can be made as to the authority of the agent issuing the policy, for that question is not involved, but as possibly more than incidental, we say that it appears that the agent, Fisher, had authority to issue the policy; it appears that the agent was by the insurer clothed with some further authority, for the reason that after the issuance of the original policy he called for a plan and plat of the premises; and, after the issuance of a policy to another, insuring lumber indiscriminately mixed with the lumber of the assured, he was acting for the insurer with respect to noting an "exception" on the policy held by that other party. These things amount to something more than mere authority to deliver a policy and receive a premium, but we pass beyond any act or declaration or knowledge of the agent because we have in this case the offer to establish the knowledge and subsequent conduct of the insurer.

We first call attention to some of the cases decided by this Court:

In *Ins. Co. v. Wilkinson* (1871), 13 Wall., 222, the determinative question was whether an insurance

company could defend an action on a policy upon the ground that untruthful answers were made to questions propounded in the application, when the agent of the company wrote a particular answer on information not furnished by the applicant but by another and without the applicant's knowledge that the answer was untruthful. The argument there was that parol evidence of these facts would vary the written instrument. The Court applied the doctrine of equitable estoppel and denied the company the benefit of that defense, saying:

"The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

In *Ins. Co. v. Wolff* (1877), 95 U. S., 326, a provision of the policy provided for a territorially restricted residence of the assured "without the consent of the company previously given in writing," and it was provided that a breach of this condition should make the policy "null and void." The assured lived and died without the restricted territory and

without the previous consent in writing of the company. This residing beyond the allowed or within the prohibited territory, without the previous consent of the company was set up in defense of an action on the policy. On this point the right of forfeiture was recognized solely on the principle that the agent to whom the renewal premium was paid was without knowledge of the facts and was without authority from the company to make the waiver. In making effective the policy provision and in the reasoning of the Court, the principle here invoked for the assured was distinctly recognized and clearly stated:

“The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended upon its pleasure whether they should be enforced. * * *

The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which create the forfeiture, and of those

which will necessarily influence its judgment in consenting to waive it."

In *Ins. Co. v. Norton*, (1877) 96 U. S., 234, the question was whether a provision of forfeiture for non-payment of premium notes had been waived. The Court recognizing the principle announced in *Statham's case*, 93 U. S., 24, held that the company would not be permitted to make the defense under the facts of that case and held that proof of facts which entitled the company to rely on the breach of the policy provision was not permitting proof of a stipulation repugnant to the written agreement, but proof of the exercise of an option which the written agreement, in legal effect, gave the insurer. The Court said:

"And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing."

Mr. Justice Strong, with Mr. Justice Swayne and Mr. Justice Field, dissented, but the dissent was rested solely on the authority of the agent, and in the dissenting opinion it was recognized "*that the company could afterwards (i. e., breach of condition) elect to treat the policy as still in force.*"

In the opinion of the Court the principle on which we rely was likened to forfeitures provided for in leases and Mr. Justice Bradley said:

"It is familiar law, that, when a lease has become forfeited, any act of the landlord indi-

eating a recognition of its continuance, such as distraining for rent, or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition."

In *Phoenix L. Ins. Co. v. Raddin* (1886), 120 U. S., 183, Mr. Justice Gray, after dealing with the meagerness of the bill of exceptions, stated the only question left open to the insurance company and the obvious answer thereto:

"It follows that the only question upon the instructions of the Court to the jury, which is open to the defendant on this bill of exceptions, is whether, if insurers accept payments of premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens."

In *Northern Assur. Co. v. Grand View Building Asso.* (1901), 183 U. S., 308, the Court gave full force and effect to the rule that a written contract could not be varied by parol and yet recognized the principle here invoked, though denied that a waiver could be established by the act of an agent not shown to have express authority to make the waiver in the absence of evidence that the company, with knowl-

edge of the facts, ratified the action of the agent. The Court reviewed the cases we have just cited, as well as other cases, and stated the principles which are sustained by the authorities with respect to the integrity of written contracts and subsequent waiver of provisions therein, and among the principles declared by Mr. Justice Shiras, speaking for the Court, were these:

"That insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

(This opinion is assailed by the Supreme Court of North Dakota in *Leisen v. St. P., etc., Co.*, 30 L. R. A. (N. S.), 539, on the idea that the decision "is opposed to the decisions of nearly every state in the Union," and the Court construed the decision to mean that the only way a provision of any insurance policy could be waived, even by the company, was by a writing indorsed on the policy, but we believe that the case is in accord with the previous decisions of this Court and, on the particular facts of the case, is well supported by authorities and that our interpretation of that de-

cision is correct, and certainly that interpretation is in accord with the construction of the case by other courts. *Clements v. German Ins. Co.*, 153 Fed., 237; *Mulrooney v. Royal Ins. Co.*, 163 Fed., 833; *Ætna Life Ins. Co. v. Frierson*, 114 Fed. 56, opinion by the late Mr. Justice Lurton, and by this Court: *Northern, etc., Co. v. Grand View, etc., Asso.*, 203 U. S., 106; *Penman v. St. P., etc., Ins. Co.*, 216 U. S., 311).

This case (*Northern Assur. Co. v. Grand View Bldg. Asso.*) came to this Court to review the action of the Circuit Court of Appeals, Eighth Circuit. In that Court the basic facts were thus stated:

"A jury found that an agent of the plaintiff in error by the name of A. D. Borgelt, who had authority to make contracts of insurance in its behalf, and to countersign and issue its policies and collect premiums thereon, and who solicited the policy in suit, had knowledge of the existence of the policy issued by the Firemen's Fund Insurance Company at the time he issued the policy in suit, but no indorsement appears to have been made upon the policy in suit relative to the existence of the prior policy."

Northern Assur. Co. v. Grand View Bldg. Asso., 101 Fed., 77.

The reasoning of the Circuit Court of Appeals was that the agent had authority to act for the company and his knowledge was to be imputed to the company. Judge Sanborn vigorously dissented from the opinion of a majority of the Circuit Court of Appeals and based his opinion that the company was entitled to plead a breach of the condition on various propo-

sitions, among them, that the assured had not been induced "to adopt a course of action or a state of inaction that it would not otherwise have taken," and that the knowledge or act alleged as a waiver was prior to or at least contemporaneous with the making of the written contract.

The same case was thereafter before the Supreme Court of Nebraska on a bill to reform the contract (*Grand View Bldg. Asso. v. Northern Assur. Co.*, 102 N. W. 246), and later in this Court on the question whether full faith and credit had been given the judgment rendered by this Court in the original case, and this Court (203 U. S. 106) declared the original holding to be:

"That the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change."

In *Iowa L. Ins. Co. v. Lewis* (1902), 187 U. S., 335, a premium note was accepted in lieu of cash and a receipt was issued reciting that if the note was not paid at maturity the policy should cease and terminate. The note was not paid at maturity. The question was whether the policy terminated at the maturity of the note, the note being unpaid, or whether the language simply placed it in the power of the insurance company to terminate the policy because of non-payment of the note. The Court held that the policy ceased and terminated when the note was not

paid, without any affirmative action by the insurance company, but recognized the principle which we insist controls the case at bar:

“A forfeiture, of course, may be waived, for the obvious reason expressed in *Insurance Co. v. Norton*, 96 U. S., 235, ‘a party always has the option to waive a condition or stipulation made in his own favor,’ and an agent can be given such power and whether it has been given or not may be proved by parol.”

The insurer, in this Court, relies upon the so-called rule in New Jersey and cites with confidence *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L., 568.

We shall, therefore, review the New Jersey cases:

In *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L., 568, the insured property was described as being used as a “dwelling and boarding house,” whereas, it was used “also as a country tavern, and in a room back of the barroom there was kept for use a billiard table.” In the classification of risks “drinking houses and taverns were classified as extra hazardous and subject to a higher premium than hazardous risks; and billiard rooms were named in the specially hazardous class, subject to a still higher premium.”

The effort was to show that the insurer’s agent knew that the property described in the policy was not the property which was actually insured; *i. e.*, that while one class of property was described in the policy, the agent knew that the property was of an-

other and different class. The Court, giving effect to the distinction between representations and warranties, held that parol evidence of the agent's knowledge of what property the assured proposed to insure was inadmissible to vary the written contract which, without ambiguity, described the property. The Court said that "the decided weight of authority is against the admission of such evidence as a clear violation of the salutary rule of law, that all prior statements are merged in the concluded contract, and that a contract put in writing cannot be added to or altered by parol testimony."

It is, therefore, seen that the effect of the parol evidence, if admitted, would have been to materially alter or vary the policy in an important particular, to-wit, the class and character of property insured.

This case (*Franklin Fire Ins. Co. v. Martin*) was cited in *Carson v. Jersey City Ins. Co.*, 43 N. J. L., 300, as sustaining the proposition that parol evidence was admissible to show that information as to encumbrances was not fraudulently withheld from the insurer.

It was cited in *Martin v. Jersey City Ins. Co.*, 44 N. J. L., 273, on the proposition that a party in possession is not guilty of a misrepresentation, which will avoid the policy, if he describes the property as his own, and to the same point was it cited in *Martin v. State Ins. Co.*, 44 N. J. L., 485, 490; *Trade Ins. Co. v. Barraciff*, 45 N. J. L., 543, 554.

In *Vivar v. Knights of Pythias*, 52 N. J. L., 455, 467, it was cited to the proposition that a representation which would avoid a policy must be one whereby "the insurer was misled and induced to make the contract of insurance," and in *Dimick v. Met. Life Ins. Co.*, 67 N. J. L., 367, to the same point.

It was cited in *Dimick v. Met. Life Ins. Co.*, 69 N. J. L., 384, 397, in connection with and as pertinent to the proposition that when an applicant for insurance and the company agreed that certain replies to questions contained in the application were material, this written contract could not be varied by parol evidence.

This case (*Franklin Fire Ins. Co. v. Martin*) was cited in *Grunauer v. Westchester Ins. Co.*, 72 N. J. L., 289, 293, on the proposition of insurable interest, and in *Kupferschmidt v. Agricul. Ins. Co.*, 80 N. J. L., 441, on the proposition that in an action at law parol evidence cannot be heard for the purpose of changing and reconstructing the contract in suit, as a basis for the liability asserted.

In *Ellison v. Gray*, 55 N. J. Eq., 581, the case was cited to the point that an unambiguous written contract cannot be varied by parol evidence.

The decision itself and the subsequent treatment thereof by the New Jersey Court shows that it merely commits that Court to the salutary and general rule that parol evidence cannot be heard to alter or vary a written contract—a rule everywhere

recognized but perhaps not always enforced in dealing with policies of insurance. The case does not go to the extent of holding that a waiver by an insurance company of a breach of a condition of a policy cannot be shown by parol evidence.

The rule in New Jersey on the principle we deem controlling is in accord with that invoked on behalf of the assured.

In *Mill. Mut. M. & F. Ins. Co. v. Mech. & Work. B. & L. Assn.*, 43 N. J. L., 652, the Court had before it a policy which provided that any change, without the insurer's consent, in the title of the assured rendered the policy void. There was, after the issuance of the policy, a change in the title. The question was whether the company assented to the change "or waived the condition of the policy in this respect." The Court held that the agent who was told of the change in the title was the insurer's general agent and it was said that "the company cannot thus lull their policy-holder into a false security, and take advantage of an omission on his part thereby induced, to work a forfeiture of their contract." (The agent had, on being informed of the change in the title, said that he would attend to it and it would be all right.)

In *Martin v. Jersey City. Ins. Co.*, 44 N. J. L., 273, the insured property was changed so as to increase the risk, the policy providing that such increase of the risk should avoid the contract. It was shown that the president of the company knew the facts

and consented to the additions which increased the risk, and the assured's contention was that this knowledge, coupled with the company's silence, estopped the company to rely on this breach of the condition of the policy. The oral statements of the insurer's executive officer were held to estop the company "from thereafter relying upon the addition as a breach of a condition which defeats a recovery."

Another question before the Court was whether the company's knowledge of the assured's obtaining of other insurance operated as a waiver of a condition that the company had to assent thereto and indorse such assent on the policy. The holding was that conduct of an insurer which induced an assured to believe that the contract still subsisted and that his property was protected, would amount to an estoppel or waiver.

The doctrine of estoppel was likewise enforced by the New Jersey Court in *Redstrake v. Cum. Ins. Co.*, 44 N. J. L., 294, wherein the distinction between waiver and estoppel is pointed out: Estoppel arising where assertion or conduct induces the belief that a requisite thing has been done; waiver arising from assertion or conduct that a right will not be claimed.

(This is peculiarly apt to the instant case for the insurer's silence induced the assured to believe that they had done the requisite thing when they stacked

their lumber on the yard as they did, in fact, stack it).

In *Agricultural Ins. Co. v. Potts*, 55 N. J. L., 158, the effort was to avoid the policy because of additional insurance, the policy providing that other insurance, unless by the written consent of the company, should make the policy "null and void." The Court held that the company's knowledge of other insurance on the property estopped it to set up this policy provision as a defense to an action to recover on the policy, using the following language:

"The natural consequence of the failure of the company to communicate to the plaintiff its decision was to induce in her the belief that it acquiesced in the further insurance of which she had given notice, and so long as this belief continued she was lulled into a false security with respect to her property. After the loss had occurred it was too late for the company to set up for the first time, in avoidance of its obligation, the very state of facts with full knowledge of which it had permitted the plaintiff to rest secure in her proposed protection."

It was further said:

"Whatever difference of opinion may exist as to the effect of notice to, or waiver by, a special agent in a given case, there can be no diversity of sentiment as to the plenary power of a party to a contract to waive any condition intended for his benefit, either before or after forfeiture, whether by express declaration or

by conduct so misleading that it estops him afterwards from claiming the forfeiture."

(Judge DePue, who wrote the opinion in *Franklin Fire Ins. Co. v. Martin*, concurred in this holding.)

The insurer, in this Court, cites cases from Texas, Wisconsin and Michigan, whereas, the rule in each one of those jurisdictions is in exact accord with the rule here invoked for the assured.

Counsel for the insurer cites *Keller v. Ins. Co.*, 27 Tex. Civ. App., 102; *England v. Ins. Co.*, 81 Wis., 583, and *Shingle Co. v. Ins. Co.*, 91 Mich., 443, as sustaining the proposition that though the insurer knew when the policy was issued that the "clear space" stipulation was being violated it had a right to presume that thereafter the assured would maintain a continuous clear space of 100 feet.

This overlooks the fact that the situation was also known to the insurer during the whole life of the first policy and that thereafter a renewal policy was issued and premium thereon accepted with knowledge of the fact which may have avoided the policy, at its option.

It is well, however, to see exactly what the cases cited hold.

In *Keller v. L. & L. & G. Ins. Co.*, 27 Tex. Civ. App., 102, the warranty was "that a continuous clear space of 200 feet shall hereafter be main-

tained." The policies covering the lumber were issued in March, 1899, and at that time neither the agent nor the company knew that the lumber was not piled 200 feet from the mill. In May, 1899, these policies were canceled and the agent was asked to write policies on the mill. He examined the mill and testified at the trial that he paid no particular attention to the lumber or its situation, as he was not then contemplating writing insurance on the lumber. In July the same agent wrote a policy on the lumber, embodying therein the "200 feet clear space clause." It was said by the Court that the evidence failed to show a "waiver of said clause" by the insurer; that the most to be made out of the proof was "that the agent of the appellee three weeks or more before the issuance of this policy knew that there was not a 200-foot clear space between the planer and the lumber as it was then situated." It was held that no waiver was established and it was said that even if the evidence showed an implied agreement "that the clear space clause in the policy would be waived, such evidence would be inadmissible for the purpose of contradicting the terms of the policy."

It is the settled law of Texas, however, that provisions for the benefit of an insurer may be waived or the insurer may be estopped to rely thereon, and such waiver or estoppel may be established by parol evidence.

Eq. Life Assur. So. v. Ellis, 105 Tex., 526, 545:

"The sounder rule is that in such cases election to forego a forfeiture may result from un-

equivocal acts by which after knowledge of the forfeiture the insurer recognizes the continued validity of the policy or does some act based thereon."

Security, etc., Co. v. Calvert, 101 Tex., 128.

Continental Ins. Co. v. Cummings, 98 Tex., 115.

Wagner v. Westchester, etc., Co., 92 Tex., 549.

Aetna Ins. Co. v. Holcomb, 89 Tex., 404:

"The fact that the plaintiff did not know the contents of the policy sued on will not relieve him from the binding force of the warranties contained in it. If, however, the insurer, knowing of the existence of a fact at the time of the issuance of the policy, inserted therein a warranty against its existence by the insured, the Court will hold it to have been waived."

So much for the Texas authorities.

In *England v. Westchester, etc., Co.*, 81 Wis., 583, the defense was that the policy was to be void if the building insured remained "vacant or unoccupied and so remain for ten days." The building insured "at the time the policy was issued, was vacant and unoccupied, and so continued until the time of the loss." The Court said: "No testimony was offered or introduced showing or intending to show that at the time of the issuing of the policy or at any time previous to the loss, the defendant had notice that said premises were vacant or unoccupied, or of any consent that the same should so remain vacant and

unoccupied, or any waiver of the condition of the policy in regard thereto."

It was with respect to these facts that the Court used the language quoted by the insurer's counsel here, the idea of the Court being that even if the insurer had known that the building was vacant, it had a right to presume that such vacancy was under the permissive period allowed by the policy.

The Supreme Court of California held, however, (*West Coast Lumber Co. v. State, etc., Co.*, 98 Cal., 502, 508) that a provision as to vacancy was waived when it was known to the insurer at the time the policy was issued, and subsequently, that the property was unoccupied.

It was also so held in *Ohio, etc., Co. v. Vogel* (by the Supreme Court of Indiana), 3 L. R. A. (N. S.), 966; and many other courts so hold.

Reverting, however, to the rule in Wisconsin: It is the settled law of Wisconsin that "any agreement, declaration or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

Knoebel v. North, etc., Co., 135 Wis., 424.

Seidel v. Equitable, etc., Co., 138 Wis., 66.

Ramsey v. Traveler's, etc., Asso., 147 Wis., 405.

In *Mich. Shingle Co. v. L. & L. Fire Ins. Co.*, 91 Mich., 441, it appeared that the assured ordered a policy to cover lumber on docks and directed that a "clear space" clause of 150 feet be made to apply. This was to avail itself of a cheaper rate of insurance. The lumber was piled within 25 or 30 feet of the mill. The Court held that the insurer was not liable and said "it is unnecessary to determine whether there is any evidence" to sustain the claim that "defendant's agent knew at the time of the issuance of the policy that plaintiff had shingles piled within 25 or 30 feet of the mill."

In Michigan the insurer is held to the utmost good faith and is estopped to set up, after loss, any matter of which it or its agent had knowledge when the policy was issued, the insurer remaining passive and lulling the assured into the belief that the policy was still in force.

Dahrooge v. Fire Assur. Co., 175 Mich., 248.

Hause v. Standard, etc., Co., 172. Mich., 59.

Laxton v. Patrons', etc., Co., 168 Mich., 448.

O'Neill v. Northern, etc., Co., 155 Mich., 564.

In *Kentucky Vermillion, etc., Co. v. Norwich, etc., Co.*, 146 Fed., 695 (Circuit Court of Appeals, Ninth Circuit) the Court dealt with a policy whereby the assured warranted that when its plant was idle a watchman would be kept constantly on duty and—

"that if such property be idle or shut down for more than thirty days at any one time,

notice must be given this company and permission to remain idle for such time must be indorsed hereon or this policy shall immediately cease and determine."

This provision of the policy was violated and a recovery was denied, though there was an offer to prove that during the life of a prior policy "the defendant had knowledge or notice that the property insured was idle." The Court dealt with the second policy as a new contract, independent of the first one (there being evidently no *renewal* feature in the first contract which made the second policy technically a *renewal*) and said:

"There was no offer to prove that the defendant in error, or its authorized agents, ever agreed to waive the clause under consideration, or that it, or they, gave permission to the plaintiff in error to leave it idle and unoccupied except upon compliance with the terms of the policy. The plaintiff in error could not have been misled or deceived by any information or knowledge which the defendant in error had as to the previous condition of the property."

The case is not authority against any position here assumed by the assured.

We deem it wholly unprofitable to make a further and more extensive review of the authorities, other than to call attention to the holding of a few of the cases which have been approved by this Court:

In *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn., 244 (approved in 120 U. S., 196), the action was on a life insurance policy containing a warranty that the assured would not leave the United States. He obtained a license to go to California via a route which would have caused him to touch a South American port. He took another route, and the Court, disagreeing as to the meaning of the warranty, unanimously agreed that the company had waived the warranty by accepting premiums after knowledge of the facts. The Court held that this was "to overlook the breach of warranty."

In *Viele v. Germania Ins. Co.*, 26 Ia., 9 (approved in 120 U. S., 196), the Court carefully considered the authorities pertinent to questions here involved and held (1) that a provision of a policy that, in a certain contingency, it "shall be void" was to be construed as meaning that the option to terminate the contract rested with the insurer, citing *Williams v. Bank*, 2 Peters, 102, and numerous other cases; (2) that while parol evidence was inadmissible to contradict or alter a written instrument, this rule did not exclude such evidence as it related to proof of a waiver of certain conditions of a written contract, citing authorities; (3) that the stipulation that an increase in the risk avoided the policy unless consent thereto be had in writing "could be waived, although, as a matter of fact, the waiver was not of the written consent but of the forfeiture," and (4) that "circumstances proving that the party treated

the contract as subsisting and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with or forfeiture waived, will be sufficient to preclude the setting up of the breaches of the condition as a defense to the contract by the party bound thereby. Thus the receipt of premium upon a policy after forfeiture thereof is a waiver"—citing numerous authorities.

In *Insurance Co. v. Slockbower*, 26 Pa. St., 199 (approved in 120 U. S., 196), it was held that the contract provision that the policy should be "void" if other insurance was obtained by the assured was waived where "the company had notice of the additional insurance and elected not to avoid the policy but treated it in full force."

In *Frost v. Saratoga Mutual Ins. Co.* (N. Y.), 5 Denio, 154 (approved in 120 U. S., 196), the assured represented "that there was no building within less than ten rods of the store insured," except as mentioned in the application. The Court held that "this was an express warranty to that effect by the plaintiff, and which is shown to have been untrue in point of fact," and proceeded to deal with the company's right to avail itself, after loss, of this breach of warranty. It appeared that the company had become fully apprized of the exact situation and thereafter made collections on the premium note executed by the assured. This was held to be a waiver

of the right to invalidate the insurance, the Court, reviewing the authorities as to an estoppel *in pais*, said: "The defendants have derived advantage from this contract and they should now bear its burden."

The following are among the many cases which have cited with approval and followed the decision of this Court in *Ins. Co. v. Raddin, supra*;

Williams v. Relief Asso., 97 Me., 158.

Rice v. New England, etc., Soc., 146 Mass., 248.

Shea v. Mass. Ben. Asso., 160 Mass., 289.

Asso. v. Turner, 19 Tex. Civ. App., 346.

Ins. Co. v. Freeman, 19 Tex. Civ. App., 635.

German Ins. Co. v. Kline, 44 Neb., 395.

Dwelling House, etc., Co. v. Brodie, 52 Ark., 17; 4 L. R. A., 460.

Selby v. Mut., etc., Co., 67 Fed., 490.

In *Dwelling House, etc., Ins. Co. v. Brodie, supra*, the Court went further than it is necessary to go in this case because, even assuming that when the policy was originally issued the insurer expected the assured to conform the lumber piles to the requirements of the policy, there was later knowledge that the assured was not doing this and, with full knowledge of all the facts, a renewal premium was received and a renewal policy was issued. The proposition stated by the Arkansas Court to which we refer being:

"The issue of a policy by an insurance company with a full knowledge or notice of all the

facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, 'and is a waiver of the known ground of invalidity.' From such conduct, the 'insured might fairly infer that he was protected.' If he does not, it is reasonable to presume that he would do so by procuring other insurance. It would not be consistent with fair dealing and honesty for the company to undertake to avoid its policy, under such circumstances, when the assured has rested in the belief he was protected, until his property was destroyed, and when that belief is the result of its conduct. It is estopped from doing so. *Manhattan F. Ins. Co. v. Weill*, 28 Gratt., 394; *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn., 254; *Combs v. Hannibal Sav. & Ins. Co.*, 43 Mo., 148; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y., 434; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich., 202; *Bidwell v. Northwestern Ins. Co.*, 24 N. Y., 302; *Rathbone v. City F. Ins. Co.*, 31 Conn., 193; *Phoenix L. Ins. Co. v. Raddin*, 120 U. S., 196 (30 L. ed. 648); *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis., 108, 28 Am. Rep., 535; *Mechler v. Phoenix Ins. Co.*, 38 Wis., 665; *Pa. F. Ins. Co. v. Kittle*, 39 Mich., 51; *Smith v. Commonwealth Ins. Co.*, 49 Wis., 322; *Aetna L. S. F. & T. Ins. Co. v. Olmstead*, 21 Mich., 246, 254; *Farmers & M. Ins. Co. v. Chesnut*, 50 Ill., 111; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88."

As to Not Pleading Estoppel.

It is said, however, that no estoppel was pleaded and, therefore, that none can be relied upon.

It is sufficient to say that no utterance of the learned attorney for the insurer can be found in the record justifying even an inference that such a proposition was in his mind at the trial. Had any such suggestion been then and there made, the defect in the pleadings, if it actually existed, could and would have been remedied by amendment. There was not a suggestion during the progress of the trial that any fact which the assured sought and proposed to establish was not permissible under the pleadings as framed. The same principle which estops the insurer from making the insistence after loss that it has undertaken to here make, should prevent it from raising this question. It is clearly not permissible for a party to insist during the trial of a case upon a certain rule of law which is supposed to prevent a recovery, and thereafter in an appellate court assert that lurking in the mind of the attorney for such party was another objection which was withheld from the Court trying the case and counsel interested on the opposite side. The courts decline to listen to such a proposition because not consonant with exact fairness, and we might pass the matter with these comments, but, as already shown, every fact was averred in the declaration which the assured insist operated to make it an act of bad faith for the insurer to decline to recognize its liability. It is not necessary for a pleader to say that the result of the facts averred is an estoppel or a waiver. Good pleading demands merely the averment of the facts, and that is what was done in the case at bar.

This case was defended below on the theory that the insurer had not waived a provision of the policy for its benefit, and that it was not estopped to plead a breach of a condition of the policy because of its knowledge of the facts which entitled it to declare the policy "null and void," which knowledge was acquired subsequent to the issuance of the original policy and prior to the receipt of the premium for and issuance of the renewal policy. If this proposition be sound, the insurer is entitled to go hence. If the proposition be unsound, the learned Circuit Court of Appeals, Sixth Circuit, was entirely correct in reversing the judgment of the lower court and remanding the case for a new trial.

Respectfully submitted,

CARUTHERS EWING,
MARSILLIOT & CHANDLER,
Attorneys for Assured.



FILED

MAR 29 1915

JAMES D. MAHER
CLERK

Supreme Court of the United States
OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK,
ET AL.,

VS.

No. 279.

O. C. RIFE, ET AL.

BRIEF FOR ASSURED,

Responding to Insurer's Reply Brief.

CARUTHERS EWING,
MARSILLIOT & CHANDLER,
Attorneys for the Assured.

Supreme Court of the United States

OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK,
ET AL.,

vs.

No. 279.

O. C. RIFE, ET AL.

BRIEF FOR ASSURED, Responding to Insurer's Reply Brief.

We would not annoy the Court with so much brief-writing but for the statements made by the learned attorney for the Insurer in his reply brief filed herein. These statements are so much at war with what we had a right to expect that we confess to some astonishment.

1.

It is said for the Insurer :

“There is no evidence in the record to show that the prior or previous policy, of which the one sued upon is claimed to be a renewal, was issued May 22, 1908 (as contended for in the brief of the Assured), or that it expired on May 22, 1909—the date when the risk under the policy sued upon commenced.”

Reply Brief for Insurer, p. 2.

Ignoring the "catch" in the phraseology of the above, to-wit: that there is no evidence that the previous policy was issued on "May 22nd, 1908," and treating the statement in its broader sense, *i. e.*, that there is no evidence that the policy sued on is a "*renewal*," (the *date* of the previous policy being of no sort of moment) we advert to the averments of the original complaint (the policy here sued on and another being involved), filed in the State Chancery Court:

"As shown by the endorsements on said policies, each is a renewal of a previous policy which had expired. In other words, the said 'Lumber Underwriters' had before the issuance of either of said policies had policies on the same property, being the property destroyed by fire, as aforesaid." Record 2.

We call attention to the declaration filed in the Federal Court—the pleadings being redrafted to conform to the procedure in said Court:

"Plaintiffs aver that each of said policies is a *renewal* of the previous policy which had expired," etc. Record 37; Print 36.

The record, as the result of the insurer's notice to the assured to produce an original letter, shows that the policy sued on is a renewal:

"Please take notice that on the trial of the above styled case on June 12, 1911, you are requested to furnish the original of the following letters, to-wit:

Letter written by D. A. Fisher, addressed to Rife & Stutzman, Tribbett, Miss., of date July

24th, 1905, relating to the *original* insurance taken out by Rife & Stutzman with Mr. Fisher, rate of premium to be charged, etc."

Record 53; Print 51.

In offering evidence as to the original policy, of which the one sued on is a renewal, the trial Court, on objection of defendant's attorney, stopped the inquiry (Record 64; Print 61). In stating what it was proposed to prove the assured stated "that policy No. 27566 was issued, which expired, *and the policy here sued on was issued as a renewal.*"

Record 64; Print 61.

Also in offering proof, excluded by the Court on the insurer's objection, reference was made to the previous policy:

"Q. Did you know of any objection, after this inspector came and examined these premises and saw them and saw what was there and how it was situated, was any objection made to you as to any condition that was then existing in the mill?

Mr. Bartels: I object to the question.

The Court: That was before the issuance of the policy?

Mr. Ewing: *It was during the pendency of a previous policy.*

Mr. Bartels: With which we've got nothing to do.

The Court: Before the issuance of the policy sued on?

Mr. Ewing: It was during the existence of a policy issued before this policy *and of which the one sued on is a renewal.*

Objection sustained.

Plaintiff excepts." Record 81; Print 76.

The policy now before the Court, No. 27668, was later offered in evidence and thereon appears:

“No. 27868, **Renewing** No. 27566.”

See Policy, Opp. Rec. p. 87.

It seems to be trifling with the proposition of fact submitted by the assured (that the policy sued on is a *renewal*) to assert that “there is no evidence in the record to show that the prior or previous policy was issued May 22d, 1908,” when the essence of the assured’s insistence reposes in the fact that the policy sued on is a renewal *and the policy itself so declares*.

With the record showing (1) an averment of a previous policy of which the one sued on is a *renewal*, (2) a notice by the *insurer* to produce a letter as to *original* insurance, dated July 24th, 1905, whereas, the policy sued on is dated May 22nd, 1909, (3) an offer by the assured to prove that “the policy here sued on was issued as a renewal,” (4) an offer by the assured to prove an occurrence “during the existence of a policy issued before this policy and of which the one sued on is a renewal” and (5) the endorsement by the insurer on the policy itself that it was issued “*renewing*” a previous policy, it is not improper to say that the impact of the statement made for the insurer with the abundantly established and uncontroverted fact tends to startle one familiar with the record.

It is also said by the insurer's learned attorney:

"There is no evidence in the record to show that the prior policy, of which it is claimed that the policy sued upon is a renewal, contained a stipulation providing for the maintenance of a clear space between the mill and the lumber insured of one hundred feet; or that it contained any clear space provision whatever."

Reply Brief for Insurer, p. 2.

It being conclusively shown that the policy sued on is a *renewal* and it not being shown that the original policy "contained a stipulation providing for the maintenance of a clear space between the mill and the lumber," it is not a far cry to the conclusion that the assured was beguiled by the insertion of such provision in the present policy. The assured had a legal right to rely on the idea that a policy "*renewing*" a previous policy would conform, in its terms, to such previous policy, nothing else appearing.

In this connection and as part of the effort to convince this Court of the absence of any connection of the policy sued on with a previous policy, it is said for the insurer:

"In the absence of some evidence showing the nature, duration and terms of the previous policy, it is difficult to see how the policy sued upon can be claimed to be a continuation of it—a technical renewal of the conditions and stipulations of the former policy."

Reply Brief for Insurer, p. 3.

In the light (1) of the averment of the declaration filed by the assured, (2) the notice given by the insurer to produce a letter relating to earlier and *original* insurance, (3) the proof offered by the assured and excluded on the insurer's objection and (4) the statement endorsed on the policy that it is issued as "*renewing*" a previous policy, the following must result:

(1) The policy sued on contains the same provisions as the policy of which it is a renewal, or,

(2) The insurer perpetrated a fraud when, in "*renewing* No. 27566," it issued the policy sued on, No. 27868, containing provisions and warranties not found in the original policy.

A "*renewal*" signifies an "*extension*" of the original contract.

Authorities cited in the original brief:

Farmers' Loan & Trust Co. v. Central, etc., Co., 193 Fed. 963.

Carter v. Brooklyn Life Ins. Co., 110 N. Y. 15.

Kedey v. Petty, 153 Ind. 179.

Lime Rock Bank v. Mallett, 34 Me. 547.

Central Bank v. Willard, 34 Mass. 150, 153.

Tannebaum v. Bloomingdale, 58 N. Y. Supp. 235.

Abel v. Phoenix Ins. Co., 62 N. Y. Supp. 218.

Holloway v. Schmitt, 67 N. Y. Supp. 169.

Strouse v. Amer. Credit Indemnity Co., 91 Md. 244.

Ins. & Law Bldg. Co. v. Bank, 71 Mo. 58, 60.

Koehler v. Hussey, (Ky.) 57 S. W. R. 241, 244.

The New York Court correctly expressed it (*Pitney v. Glen Falls Ins. Co.*, 65 N. Y. 6) by saying that while "a renewal is in one sense a new contract" it is not "other insurance within the meaning of a policy." "*It is but a continuance of an existing insurance.*"

The same Court later said (*Hay v. Star Ins. Co.*, 77 N. Y. 235; 33 Am. R. 697) that "an agreement to renew a policy implies that the terms of an existing policy are to be continued."

Or, as Cooley points out in his *Briefs on the Law of Insurance*, Vol. 1, page 516:

"Policies in renewal have in some instances been called 'reinsurance policies' (*Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235). Though it is true that, under a renewal of the contract of insurance, the property is, in the ordinary meaning of the word, reinsured, this term has acquired a technical significance, and a mere renewal is not properly a reinsurance contract."

The result as stated by Cooley, (Vol. 3, page 2648) being:

"The rule as to waiver or estoppel by the issuance of a policy applies to the renewal of a policy with knowledge of changes contrary to the terms of the original policy. Hence, if an insurance company, at the time of renewing a policy, knows of a change which has occurred since the issuance of the original policy, the renewal is a waiver of a condition making the policy void in case such change took place."

3.

It is said for the insurer:

“Assuming, for the sake of argument, that the previous policy was similar in all respects to the policy sued upon (excepting as to the time of expiration, claimed by counsel for the assured to be May 22, 1909), we say, as a matter of law, that the proposition contended for by counsel for the assured does not apply.”

Reply Brief for Insurer, p. 3-4.

Following the foregoing are certain alleged reasons why the statement is sound. We say that when the policy sued on is shown to be a renewal of a previous policy and it is issued as and for a renewal, *i. e.*, “renewing” a previous policy, it is to be treated as but an *extension* of the original contract. If our insistence, as originally made is sound then the insurer’s liability is sure and certain.

4.

It is said for the insurer that the pleadings do not justify a recovery on the insistence here made.

Reply Brief for Insurer, p. 5.

The statement made for the insurer in this behalf being:

“The pleadings of the insured—original and reformed—though somewhat different in form, contain the same averments in substance.

They refer to a \$5,000.00 policy, numbered 27868, issued by the Lumber Underwriters, de-

fendants herein, on May 22, 1909. They aver that 'said policies (referring to another policy as to which a non-suit was taken) were in force at the time of the fire, and the same are filed as a part of this bill and exhibited herewith.'

To sustain the foregoing statement it is assumed that "they" and "said policies" refer to "another policy as to which a nonsuit was taken." The idea seems to be that "they" means "it" and that "said policies" means one policy.

The learned attorney for the insurer should have understood that the reference was (1) to the policy now before the Court, involving \$5,000.00, and (2) a policy for \$2,000.00, with respect to which a nonsuit was taken.

We will make this clear: In the original suit, instituted in the Chancery Court of Shelby County, Tennessee, under the Act of 1875 giving the Chancery Court and the Circuit Court concurrent jurisdiction of all actions except for unliquidated damages, sounding in tort, two policies were declared upon:

"Policy No. 27979, for \$2,000.00 issued by 'Lumber Underwriters' on Sept. 16, 1909.

Policy No. 27868, for \$5,000.00, issued by 'Lumber Underwriters' on May 22, 1909."

Record 1; Print 2.

After removal to the Federal Court the pleadings were reformed and a declaration, in one count, was filed and therein it was averred:

"Plaintiffs aver that they had \$7,000.00 insurance on said property represented as follows:

Policy No. 27979 for \$2,000.00 issued by defendant on September 16th, 1909.

Policy No. 27868 for \$5,000.00 issued by defendant on May 22nd, 1909.

Said policies are here to the Court shown and are made the basis of this suit."

Record 21; Print 20.

It was also averred:

"Plaintiffs aver that while the policies preceding the two here sued on were in force and effect and contain the one hundred feet clear space clause, the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber and with especial reference to the distance between the lumber and the plaintiffs' mill."

Record 21-22; Print 21.

The policy for \$5,000.00 is endorsed "No. 27868, *Renewing* No. 27566" and the further averment was made:

"Plaintiffs aver that defendant issued the policy with notice and knowledge of all the facts, said notice being conveyed from policy 27868, which showed the clearance plaintiffs expected to maintain; said notice consisted of a direct and specific statement of the facts to defendant's agent by plaintiffs; said notice and knowledge arose from a plat in defendant's possession showing the facts and plaintiffs aver that one of the defendant's agents sent to the mill for the

purpose of investigating and learning the facts did investigate and did learn that the clearance was not one hundred fifty feet whereby plaintiffs aver that the said provision was fraudulently inserted by defendant."

Record 23-24; Print 21-22.

Thereafter the insurer moved the Court—

"to require the plaintiffs to reform their declaration, so as to declare in separate counts with reference to the two contracts of insurance sued upon."

Record 36; Print 34-35.

On this motion being filed the assured declared on each policy separately. Record 37; Print 35-36.

In the first count it was averred:

"Plaintiffs aver that they had \$7,000.00 insurance on said property represented as follows:

Policy No. 27979 for \$2,000.00 issued by defendant on September 16th, 1909.

Policy No. 27868 for \$5,000.00 issued by defendant on May 22nd, 1909.

* * * * *

Plaintiffs aver that while the policies preceding the two here sued on were in force and effect and contain the one hundred feet clear space clause, the defendant sent an agent to plaintiffs' mill and such agent examined into and became fully acquainted with the exact conditions and especially with the method and manner of stacking lumber and with especial reference to the distance between the lumber and plaintiffs' mill.

Plaintiffs aver that the defendant had a plat showing the exact facts in that behalf."

Record 37; Print 36.

We think the foregoing excerpts from the pleadings more than enough to refute the statement that "they" was erroneously used for "it" and that "said policies" referred "to another policy as to which a nonsuit was taken" rather than to the policy before this Court as well as the other policy not before the Court.

The propositions of law advanced in our original brief and argument are not answered, as we conceive, and they are surely not met by statements of fact that seem to be in the teeth of the record.

The insurer issued the policy here sued on as a renewal, *eo nomine*, and this but extended the original contract without regard to its date or whether it bore a date. The insurer accepted a premium on the policy sued on, in extension of or in "renewing" the prior policy, and cannot set up a breach of warranty of which it had knowledge when such premium was accepted.

We repeat that when the insurer elected not to avoid the policy but treated it as in full force and accepted new benefits therefrom, "renewing" it to get those benefits, it assumed the burdens imposed by the contract. The language of Mr. Justice Gray in *Phoenix, etc., Ins. Co. v. Raddin*, 120 U. S. 183, will bear repetition:

"To hold otherwise, would be to maintain that the contract of insurance requires good faith of the assured only and not of the insurer, and to permit insurers knowing all the facts, to

continue to receive new benefits from the contract while they decline to bear its burdens."

This is a hard case for the assured, in any aspect of it; the assured paid what was demanded by the insurer; the insurer consciously and knowingly accepted the benefits of the contract; the insurer unconscionably repudiated the burdens of the contract after taking its chance.

We trust that the assured may recover; if the assured cannot recover we want the right denied on the facts as they actually exist, hence, this reply to the brief lately filed for the insurer.

Respectfully submitted,

CARUTHERS EWING,
MARSILLIOT & CHANDLER,
Attorneys for the Assured.



Office Supreme Court, U. S.

FILED

MAR 11 1915

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK
ET AL

VS.

No. 279.

O. C. RIFE ET AL.

INSURERS' REPLY TO RESPONDENTS' BRIEF.

R. LEE BARTELS,

Attorney.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

LUMBER UNDERWRITERS OF NEW YORK
ET AL.

vs.

No. 279.

O. C. RIFE ET AL.

INSURERS' REPLY TO RESPONDENTS' BRIEF.

I.

The main contention relied upon by counsel for the Respondents to support the judgment of the Circuit Court of Appeals is, in a nutshell, this:

That the policy sued upon is a renewal of a previous policy, issued May 22, 1908, and is in legal contemplation but a continuation of the original contract of insurance;

That the Insurers having acquired knowledge of the violation of the clear space warranty of one hundred feet during the existence of the previous policy, such knowledge, followed by the acceptance of a sub-

sequent premium by the Insurers, would operate as an estoppel to prevent the Insurers from insisting upon a forfeiture because of non-compliance with the clear space warranty.

Brief for the Assured, p. 10, Proposition 1.

Argument for the Assured, p. 19.

ANSWER OF THE INSURER TO THIS CONTENTION.

Facts.

1. There is no evidence in the record to show that the prior or previous policy, of which the one sued upon is claimed to be a renewal, was issued May 22, 1908 (as contended for in the brief of the Assured), or that it expired on May 22, 1909—the date when the risk under the policy sued upon commenced.

2. There is no evidence in the record to show that the prior policy, of which it is claimed that the policy sued upon is a renewal, contained a stipulation providing for the maintenance of a clear space between the mill and the lumber insured of one hundred feet; or that it contained any clear space provision whatever.

3. There is no evidence in the record to show that the prior policy, of which it is claimed the policy sued upon is a renewal, contained a renewal feature such as is to be found in the policy sued upon;

and no evidence to show any of the terms of the previous policy.

4. There is no evidence in the record to show that the former policy, of which it is claimed the policy sued upon is a renewal, was issued by the Lumber Underwriters, the Insurers issuing the policy in controversy.

5. There is no evidence in the record to show an acceptance by the Insurers of a premium under the policy sued upon, or the acceptance of any premium subsequent to February, 1909, when it is claimed the inspector for the Lumber Underwriters was advised that a clear space of one hundred feet was not then maintained.

The policy sued upon bears date May 27, 1909.
(Second Stip. of Counsel.)

In the absence of some evidence showing the nature, duration and terms of the previous policy, it is difficult to see how the policy sued upon can be claimed to be a continuation of it—a technical renewal of the conditions and stipulations of the former policy.

Law.

Assuming, for the sake of argument, that the previous policy was similar in all respects to the policy sued upon (excepting as to the time of expiration,

claimed by counsel for the Assured to be May 22, 1909), we say, as a matter of law, that the proposition contended for by counsel for the Assured does not apply, because:

1. The Insured's pleading does not seek a recovery upon a previous policy, but is based upon a right to recover under the contract made a part of the complaint by way of profert and filed as evidence in the cause; and the right to recover is based upon a compliance with the conditions and requirements of such contract, and not upon provisions of a previous contract.

2. If the contract sued upon be treated as merely a renewal of a previous policy, nevertheless the renewal is itself a new contract, effective from its date, May 27, 1909, the previous contract having then expired; and the rights of the parties are dependent upon its terms.

3. As a matter both of law and fact, the contract sued upon, being complete in all its parts, shows a meeting of the minds of the parties with respect to the provisions thereof, and is clearly a separate and independent contract, distinct from a previously expiring policy.

4. An estoppel, based upon previous knowledge, does not exist with respect to the rights of the parties under contracts not then in existence—future contracts made thereafter.

5. The doctrine of estoppel, based upon knowledge of conditions prior to the issuance of a policy, has no application to requirements to be performed after the delivery of the policy—i. e., future acts, or promissory warranties.

(The last two propositions are discussed in the original brief, and will not be further treated here.)

I.

NO PLEADING BASED UPON A PREVIOUS POLICY.

The pleadings of the Insured—original and reformed—though somewhat different in form, contain the same averments in substance.

They refer to a \$5,000.00 policy, numbered 27868, issued by the Lumber Underwriters, defendants herein, on May 22, 1909. They aver that “said policies (referring to another policy as to which a non-suit was taken) were in force at the time of the fire, and the same are filed as a part of this bill and exhibited herewith.”

The clear space warranty contained in the policy in controversy, No. 27868, is quoted *in haec verba*. It is claimed that this warranty was in accordance with the facts and the understanding of the Insured. It is claimed that the warranty to maintain a clear

space of one hundred feet was not violated, the exact language in that regard being:

“As to policy 27868 (one in controversy), the complainants charge that there was no violation of said provision (relating to clear space), and that the Insurer so knew the fact.”

Record Print, 2-4.

True, there is a reference to a previous policy or policies, and it is averred that the policy in controversy was a renewal of the previous policy, **but it is admitted that said previous policies had expired**, and that the policy in controversy had issued to commence May 22, 1909.

Record Print 2.

When a policy of insurance is continued, such continuance differs from a new contract of insurance, as by it the original contract is kept up, and in case of loss **the original policy is the basis of the action** in connection with the contract of renewal.

Wood on Fire Insurance, Vol. 1, p. 336, Sec. 139.

If a simple renewal of old insurance has been effected, an action would necessarily have to be brought upon the former policy.

Arlington Co. vs. Empire City Fire Ins. Co.,
116 App. Div., 460-461.

A RENEWAL OF AN EXPIRED POLICY IS A NEW CONTRACT

If we treat the issuance of the policy in controversy as a mere technical renewal of a previously existing policy, expiring May 22, 1909, nevertheless such renewal is in all respects a new contract, and the rights of the parties are alone dependent upon the provisions of such new contract.

Hartford Fire Insurance Co. vs. Walsh, 54 Ill. 167.

De Jeanette vs. Fidelity & Casualty Co., 98 Ky. 561.

Grocery Co. vs. Fidelity & Guaranty Co., 130 Mo. App. 430.

Proctor Coal Co. vs. U. S. Fidelity & Guaranty Co., 124 Fed. 424.

Danvers Savings Bank vs. National Surety Co., 166 Fed. 671.

A brief quotation from the Illinois case, which deals with the vacancy clause, will suffice:

“A renewal of a policy (not by issuance of a new policy, but by giving a renewal receipt referring to old policy and expressly continuing it) is in effect a **new contract** of assurance, and, unless otherwise expressed, on the same terms and conditions of the old policy. If the property was occupied when the last renewal occurred, under the terms of the policy

it became the duty of the Insured to give the same notice of vacancy that was required by the original policy, and to obtain the consent of the company.

“No one could for a moment contend that the consent of the company given a year previous to the last renewal could have bound the company, had there been a new application and new policy granted instead of the renewal. And in what respect does this renewal differ from the grant of such a policy? The old contract ended on the 4th, and the renewal bears date the 8th of June, 1868. It thus appears there can be no pretense that there was a continuation of the former insurance, but it must be regarded as a new contract upon the same terms and conditions as was entered into and formed the original contract of insurance.”

The Federal cases referred to above were suits upon bonds or surety contracts, continued by the mere issuance of renewal receipts; and the courts held such continuations to be new contracts.

3.

THE POLICY SUED UPON NOT A RENEWAL, BUT A NEW AND COMPLETE CONTRACT.

The contract in controversy is complete in all of its terms, and is a new, separate and independent contract from any former policy. The minds of the parties have met upon its terms, and their rights

must be governed accordingly—unaffected by any knowledge acquired under a previously existing contract.

Kentucky Vermilion Co. vs. Insurance Co.,
146 Fed. 695, 700.

Brady vs. Northwestern Insurance Co., 11
Mich 425, 445.

Arlington Co. vs. Empire City Fire Ins.
Co., 116 App. Div. 460-461.

Hartford Fire Insurance Co. vs. Walsh, 54
Ill. 167.

A brief reference to the case decided by the Circuit Court of Appeals—Kentucky Vermilion Co. vs. Insurance Company (*supra*)—will suffice. There an effort was made to introduce oral testimony to show that the Insurer had knowledge during the life of a former policy that the property insured had been idle—this for the purpose of showing a waiver of a condition in a later policy, which was identical with a like provision in the former policy requiring its operation. The Court, in holding that the conditions that existed during the prior policy could not be considered, said:

“The second policy was not a mere continuation of the **first**, though in terms and conditions it was identical with the first, except as to dates. It was not in any manner dependent upon any acts or conduct of the parties under the first policy. The minds of the respective parties met upon the issuance of

the policy by the insurance company and the payment of the premium by the insured. The second policy then became a new, separate and independent contract between the parties. In *Brady vs. Northwestern Insurance Co.*, 11 Mich. 425, the Court said: 'We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and it was optional with both parties. *
• •'

"The second policy as delivered and accepted must therefore be presumed to express the entire contract of the parties. The rule is well settled that all parol negotiations, understandings and agreements are merged in the written contract."

If the theory contended for by counsel for the Insured be correct, then there could never be a new written contract made by the parties at the expiration of a previous contract identical in terms, which would be operative according to its provisions, where during the previous contract a violation of such provisions had been overlooked.

Time and again this Court has held that a mere indulgence to an insured on one occasion, or a waiver of a forfeiture or lapse of a policy (unless habitual), does not warrant or justify the insured in claiming that such an indulgence or waiver will be continued throughout the life of the contract.

Thompson vs. Insurance Co., 104 U. S. 252, 303.

If counsel for the Insured be correct in his contention, the fact that a lessor had overlooked an act of the lessee, that would have justified a forfeiture of the lease in a rental contract that had expired, would preclude him from thereafter insisting upon such a forfeiture in a subsequent contract.

And so the holder of a note might not have insisted upon interest being paid at due date, and the failure to so insist would prevent the holder from thereafter calling upon the obligor to pay such interest at maturity, under a renewal.

Authorities Cited For the Assured Distinguished.

Counsel for the Assured has cited four authorities to support his proposition that the issuance of the policy in controversy was a mere continuation of the original contract of insurance.

In not a single one of the authorities referred to was **a new policy issued**—the old policy was merely renewed or continued by a renewal receipt, referring to the prior policy. Commenting upon them separately:

Mallette vs. Assurance Co., 91 Md. 471.—This was an action to recover upon an oral agreement to renew an expiring policy. The sole point at issue was whether or not there was an agreement to renew an expiring policy.

No new policy was in fact issued, and no question was made in the case as to parol evidence being admitted to show knowledge of a previous condition in order to establish waiver.

Hay vs. Star Fire Insurance Co., 77 N. Y. 235.—This was an action in equity to reform a policy, because the insurer had, as it was claimed, through fraud, changed the terms of the contract as agreed upon by the parties.

Evidence was of course admitted to show what the contract was.

Martin vs. Jersey City Insurance Co., 44 N. J. Law 73.—In this case no new policy was issued, but a receipt was given to the insured, renewing the old policy.

None of the above authorities hold (and we know of none that do hold) that because an insurer has excused a violation of a requirement, under an expired contract, it is thereafter precluded from insisting upon a compliance of a similar requirement contained in a subsequently made contract.

II.

THE OBJECTION TO THE EVIDENCE.

It is claimed that the objection made by counsel for the Insurers to the question propounded to Mr. Blair, making inquiry as to whether Mr. Fisher, the

agent, called his attention to the fact that the Company had sent an inspector to the property and had examined it prior to May, 1909, and that the Company had the report of the inspector, is too vague and general to allow the Petitioners to question the competency of this evidence in this Court.

The objection to the question was in these words: "It is not relevant to the matter at issue and is wholly immaterial and irrelevant."

Record Print 82.

The general rule, as the writer understands it, is that where an objection is made to evidence upon the ground stated, it is held to be too general, and if the evidence be admitted the complaining party cannot rely upon its admission in the Appellate Court; but where **its inadmissibility is apparent upon the face of the question itself**, the objection in the words stated is sufficient.

Sparf vs. United States, 156 U. S. 51; 56-57.

Sparks vs. Oklahoma, 146 Fed. 374.

It is respectfully submitted that it plainly appears upon the face of the question that counsel for the Insured was calling for a statement that a third party had made to the witness—hearsay testimony.

In addition, it was plainly discernible that to admit the evidence would tend to vary and contradict the terms of the written contract subsequently made.

The question of practice relied upon by counsel for the Insured is, in the opinion of the writer, not applicable at all to the evidence and the objection thereto as presented in the case here.

The evidence was not admitted, and the objector is not complaining of the admission of the evidence. On the other hand, the evidence was rejected, the Court treating it as incompetent upon any ground, and it is the Insured that is complaining of the action of the Court in sustaining the objection and in holding the evidence to be incompetent.

The Court of Appeals held the evidence competent. This Court is reviewing the action of the Court of Appeals with respect to the competency of this evidence. If it be incompetent upon any ground material to the issues involved in the controversy, as I understand the law, it was the duty of the trial court to exclude it, and equally the duty of this Court to exclude it.

Respectfully submitted,

R. LEE BARTELS,
Attorney.